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Supreme Court, U.S.
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IN THE

Supreme Court of The United States

October Term, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,

Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission's definition of "public body" that excludes public entities which sell power at retail and have access to distribution facilities through lease or contract, rather than owning or physically controlling such facilities, is consistent with the language and intent of the Niagara Redevelopment Act.

2. Whether the Federal Energy Regulatory Commission's definition of "yardstick competitor" that excludes public entities which do not totally displace investor-owned utilities, but do compete with them for power sales both inside and outside the franchise area and whose rates serve as a yardstick for regulators, is consistent with the language and intent of the Niagara Redevelopment Act.

3. Whether the Federal Energy Regulatory Commission's definition of "public body" that excludes public entities which sell and distribute power to satisfy the partial requirements of customers who are also supplied by investor-owned utilities, is consistent with the language and intent of the Niagara Redevelopment Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit were those in the caption, and, as petitioners: Allegheny Electric Cooperative, Inc., Vermont Department of Public Service, Upstate Public Utility Services Association, County of Westchester Public Utility Service Agency, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, and Power Authority of the State of New York. The Vermont Department of Public Service and the County of Westchester Public Utility Service Agency petition separately for certiorari.

As intervenors: Allegheny Electric Cooperative, Inc., Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation, City of Cleveland, Ohio, Public Service Electric & Gas Company, City of New York, Port Authority of New York and New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company.

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OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,

Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1990, rehearing denied February 12, 1991.

OPINIONS BELOW

The decision of the Federal Energy Regulatory Commission ("the Commission") is reported at 48 FERC ¶ 61,124 (1989)(Opinion 329)(64-109a).[1] The decision of the Commission denying rehearing is reported at 49 FERC ¶ 61,068 (1989)(110-114a). The decision of the Court of Appeals is reported at 922 F.2d 73 (2d Cir. 1990)(1-24a).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1990 (1a). The Second Circuit denied rehearing on February 12, 1991 (115a). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 836 of Title 16 of the United States Code is set forth in the Appendix (116a).

STATEMENT OF THE CASE

This case arises out of the ongoing battle for inexpensive electric power at a time of rising power costs. In New York City, for example, Consolidated Edison Company ("Con Edison"), a private investor-owned utility, charges residential customers almost 16¢ a kilowatt hour, on average; municipal utilities in New York State that own distribution facilities and meet all or most of their power requirements with inexpensive hydroelectric power, charge, on average, 3¢ a kilowatt hour. (2631-32A, Vol. IX). The challenge here is to the Commission's interpretation of what

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[1] The opinion is reprinted in the Appendix to the Petition for Writ of Certiorari. The Appendix is jointly filed by petitioner herein and by the Vermont Department of Public Service, and the County of Westchester Public Utility Service Agency which petition separately for review by this Court. Citations to the Appendix are made to the page number therein as "__a". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "____ A, Vol. ____". "R. ___" refers to the record below.

Congress meant in 1957 when it enacted the Niagara Redevelopment Act, giving a preference for allocations of limited, inexpensive hydropower to "public bodies."

The Niagara Redevelopment Act ("NRA") authorized the Commission to issue a license to the Power Authority of the State of New York ("Power Authority") to construct and operate a hydroelectric project "with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." 16 U.S.C. § 836(a). Section 836(b)(1) of the NRA provides that "public bodies" and nonprofit cooperatives shall be eligible for allocations of inexpensive hydroelectric power, known as "preference power," from the Niagara Project. Article 20 of the Project license, taken verbatim from the NRA, provides:

> (1)In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1). Article 21 of the Project license further provides that a reasonable portion (not to exceed 20%) of the preference power shall be made available "for use within reasonable economic transmission distance in neighboring States." 16 U.S.C. § 836(b)(2).

In 1960, the Power Authority began entering into long-term contracts for preference power from the Niagara Project, which were set to expire on June 30, 1985. (2878-79A, Vol. IX). Under these contracts, in-state preference power had been allocated to rural electric cooperatives in the State, and to municipalities that owned distribution facilities. These municipal systems were members of the Municipal Electric Utilities Association ("MEUA"), intervenors below.

In anticipation of the expiration of the in-state contracts for the sale of preference power, municipalities throughout the State of New York began to form publicly owned entities under New York General Municipal Law Article 14-A.[2] Petitioner New York City Public Utility Service ("NYCPUS") was approved by public referenda and created in 1982 to "establish, construct, lease, purchase, own, acquire, use and/or operate facilities... for the purpose of furnishing ... any service similar to that furnished by any public utility company ...." (360A, Vol. II). Petitioner does not own distribution facilities; instead, it sells and distributes power to its customers at retail over distribution facilities leased from Con Edison, an investor-owned utility. On July 1, 1985, the Power Authority included petitioner and similar public entities in its allocation of preference power. (2894-96A, Vol. IX).

Recognizing that the Power Authority's allocation of a small amount of preference power would serve only a fraction of the total electrical requirements of all City consumers, petitioner chose to target its hydropower to manufacturers, some of whom were relocating within the metropolitan area, particularly in New Jersey, where electric costs typically are lower. By targeting this customer class, petitioner increased the likelihood that these employers would remain in or move into the City. (R. 5684-85). These sales also provided a clear example to consumers of the value of a public power alternative. Petitioner sold and distributed 60% of its hydropower to about 5,000 manufacturers, who received approximately 50% of their electricity requirements from petitioner. The remainder of the hydropower was allocated to approximately 2.1 million residential customers. (143A, Vol. I; R. 5684-86, 1659).

On March 26, 1985, the Power Authority approved preference contracts with seven neighboring states,[3] including the Vermont Department of Public Service ("VDPS"), based on the holding of the Federal Energy Regulatory Commission, 55 FPC 1109 (1976), that VDPS was a "public body." (2901-03A, Vol. IX). But on March 27, 1985, the Commission issued Opinion 229 in which it decided that VDPS was not an NRA "public body" because VDPS was selling preference power to private utilities at wholesale instead of selling directly to customers at retail.[4] Vermont then enacted a new statute intended to bring VDPS within the Commission's definition of "public body," and the Power Authority included VDPS in the preference allocation to neighboring states. (2903A, Vol. IX).

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[2] When the Niagara Project went into service in 1961, there was no significant cost advantage to switching to Niagara Project power. It was only at the time of the 1973 oil embargo "which drastically increased the price of fossil fuels, followed by double-digit inflation" that hydropower became a "prized commodity." *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 99-100 (2d Cir. 1984) ("*PASNY*").

[3] The seven neighboring states were Pennsylvania, Ohio, New Jersey, Massachusetts, Connecticut, Rhode Island and Vermont.

This case was initiated by two complaints which were filed with the Commission in 1986 challenging the Power Authority's July 1985 allocations of "preference power" to petitioner and similar public entities, and VDPS.[5] The two complaints were consolidated, and a month-long hearing was held before an Administrative Law Judge ("ALJ"). In his initial decision, the ALJ articulated criteria for defining a "public body" and concluded that petitioner and VDPS were not eligible to receive preference power. (25-63a). By a vote of 4 to 1,[6] the Commission affirmed the ALJ's decision and adopted his rationale. (64-109a).

The Commission held that the essential characteristics of a public body rest on its capability of selling and distributing power directly to consumers of electricity at retail. The Commission, first, required public bodies to provide yardstick competition by (a) posing a threat of takeover and displacement of investor-owned utilities, (b) substantially meeting the energy needs of their customers, and (c) providing an opportunity for rate and quality of service comparison. (88a). Second, the Commission determined that a public body must be directly responsible to its retail customers for electricity sold and delivered by deciding how to meet customers' requirements. Third, the Commission decided that a public body must maintain control of the distribution system "without restraint," with the power to employ cost cutting measures. (72-73a, 88-89a). According to the Commission, petitioner and others similarly situated did not qualify as public bodies because there was "insufficient separation of functions between [petitioner and the investor-owned utility] to create a threat of displacement, to allow [petitioner] substantially to serve [its] customers' needs, or to provide an opportunity for rate comparison." (95a).

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[4] *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 30 FERC ¶ 61,323 (1985) (Opinion 229), *clarified and rehearing denied*, 32 FERC ¶ 61,194 (1985) (Opinion 229-A), *aff'd*, *Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986) ("*MTA*"), *cert. denied*, 479 U.S. 1085 (1987).

[5] One complaint was filed by MEUA and the second complaint by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"). These complainants are associations of public entities that have been receiving preference power.

[6] The dissent by Commissioner Stalon does not appear to be reflected in the reported version of the case, but it is reflected on the videotape of the Commission's session and was not disputed below. *See* Petitioners' Joint Brief, July 19, 1990, at 11. *See also* dissent by Commissioner Stalon in *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, *supra* n.4, 30 FERC at 61,659.

The Second Circuit affirmed the Commission's order (1-24a). Although the Court of Appeals agreed with petitioners below that the NRA itself does not impose the "strict standards" articulated by the Commission for public body eligibility, the Court deferred to the Commission's three-pronged public body test. (14a, 16-17a). The Court held that a public body's competitive role could not be achieved without "active management control over the distribution of preference power." (17a). The Court upheld the Commission's conclusion that petitioner and other similar entities did not qualify as public bodies because they "lacked the requisite degree of control over distribution." (20a).

Under the Commission's criteria, only those municipal utilities that own or physically control distribution facilities are eligible "public bodies." As a consequence, the allocation of preference power will likely remain frozen as it is today, benefitting approximately 2% of the State's residential electric customers (2883A, Vol. IX). Few new public bodies will be likely to enter the public power market: it is no longer economically feasible to duplicate or condemn a private utility's distribution system in order to qualify as a public body (126-27A, Vol. I), and it is not possible, particularly in areas as large as the New York metropolitan area, to ensure that there will be enough preference power to fully supply customers' needs.[7] The few municipal systems that do qualify will continue to sell power so cheaply that there is no incentive to conserve; energy consumption by customers of municipal systems has grown at a rate significantly greater than that of customers of private investor-owned utilities (2883A; Vol. IX). The Commission's decision effectively limits opportunities for increased competition in the electric utility marketplace -- it closes the door to new entrants who cannot totally displace investor-owned utilities, but who can compete with them for part of their load by selling power to consumers and arranging for distribution by lease or contract.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW CONCERNING THE ELIGIBILITY OF PUBLIC ENTITIES FOR ALLOCATIONS OF PREFERENCE POWER.

This case presents the important question of whether Congress intended to favor with allocations of inexpensive preference hydropower only those public entities that own or physically control distribution facilities, and to deny this limited resource to public entities that sell power to consumers at retail and distribute that power over the facilities of investor-owned utilities pursuant to contract or lease. The impact of the Commission's decision is significant not only for public entities within New York State, where the Niagara Project is located, but for public entities in all states within economic transmission distance, including Vermont, Massachusetts, Connecticut, Rhode Island, Ohio, New Jersey and Pennsylvania. In addition, there are many other statutes affecting different parts of the country that mandate preferences for various types of public bodies.[8]

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[7] Without a guarantee of full requirements at inexpensive preference power rates, the Town of Massena, for example -- one of the few municipalities in New York to take over a private system -- might have had to rethink its decision. (91-92A, Vol. I).

The Tenth Circuit recently considered the meaning of the preference clause in the Colorado River Storage Project Act, 43 U.S.C. §620c, which incorporates the preference provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c). *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). By a vote of two to one, the Court of Appeals upheld the determination by the Western Area Power Administration that the statutory preference for "municipalities and other public corporations or agencies" did not mean that preference should be given to all municipalities, but only to municipalities that operate their own utility systems. *Id.* at 978-79. The dissent relied on the plain language of the statute to find that all "municipalities" -- not just "municipalities with utility responsibility" -- were eligible preference entities. *Id.* at 984.

This Court has previously recognized the importance of questions relating to a statutory preference for limited public power. In *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380 (1984), this Court -- "[b]ecause of the importance of the issue," *id.* at 389 -- considered the impact on the preference clause of the Bonneville Project Act ("BPA") of the Pacific Northwest Electric Power Planning and Conservation Act, enacted by Congress in 1980 "to avert what appeared to be an emerging customer struggle for BPA power." *Id.* at 383. Similarly here, the meaning of the NRA's preference provision should be resolved by this Court.[9]

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[8] *See, e.g.*, 16 U.S.C. §§833b, 833c (Fort Peck Project) (preference given to public bodies defined as "States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof"); 16 U.S.C. §§832b, 832c (Bonneville Project) (same); 16 U.S.C. §831i (Tennessee Valley Authority) (preference given to States, counties and municipalities, including public agencies, and cooperatives); 43 U.S.C. §485h(c) (Reclamation Project) (preference given to municipalities and other public corporations or agencies); 43 U.S.C. §620c (Colorado River Storage Project) (same); Flood Control Act, 16 U.S.C. § 825s (preference to "public bodies and cooperatives").

A. The Commission And The Second Circuit's Limited View Of Competition Presents A Significant Issue Necessitating Resolution By This Court.

The Second Circuit upheld the Commission's view that the competitive benefits intended by Congress could not be realized unless public entities maintained day-to-day control over distribution facilities. (16-17a, 21a). Indeed, the Court of Appeals found that "the most compelling argument" against the leasing or contractual arrangements before it was that "the distribution costs of the lessee public entity and the lessor private utility will always be the same," thus precluding competition. (21a). This holding conflicts with decisions of other Courts of Appeals recognizing that competition is enhanced even when the operations of one market participant are dependent on access to facilities owned by another.

For example, in the natural gas industry, the Commission itself has ruled that pipeline companies -- who had previously refused to "transport gas for third parties where to do so would displace their own sales" -- must open access to their transportation services. *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The Court of Appeals for the District of Columbia recognized that the Commission's order to pipeline companies to "transport the gas with which their own sales compete," *id.* at 994, would remedy a lack of competition "by exposing pipelines to competition and its normal consequences." *Id.* at 1001.

Similarly in the telecommunications industry, competition is enhanced when a private utility provides access to essential distribution facilities. *See MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The fact that the costs of leasing or contracting for use of a competitor's facilities may be the same as the costs to the owner of the facilities does not detract from the enhanced competitive benefits of open access.

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[9] This Court previously considered the NRA in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). The Court noted that the preference provision and other licensing conditions mandated in the statute resolved disagreements that had "continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses, and delayed congressional authorization of the project for seven years." *Id.* at 102 (footnote omitted).

Notwithstanding its use of a competitor's facilities, petitioner provides enhanced competition in the utility marketplace as envisioned by Congress when it enacted the NRA. First, petitioner competes directly with the private utility for all or part of the business of retail customers; every kilowatt hour sold by petitioner is a kilowatt hour lost to Con Edison. (R. 3071-72, 1776). Petitioner also competes with private utilities outside the franchise area by inducing businesses to stay in and move to New York City, rather than to other nearby areas, including New Jersey. (R. 5684-86). *See City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981).

Second, petitioner competes as a yardstick, using its lower hydropower rates to "force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return." *MTA*, *supra* n.4, 796 F.2d at 592, *citing PASNY*, *supra* n.2, 743 F.2d at 105. Third, petitioner provides customers with the opportunity to make cost comparisons by looking at their bills, thus encouraging customers to challenge the investor-owned utility to increase in efficiency. (437-38A, Vol. II). In affirming the Commission's order, the Second Circuit ignored petitioner's competitive roles, and failed to recognize that petitioner's access to an investor-owned utility's distribution system for a reasonable fee promotes, rather than precludes, competition.

B. The Commission And The Second Circuit's View Of Yardstick Competition In This Case Is Contrary To Congressional Intent.

In adopting the NRA, Congress intended to incorporate the principle of "yardstick competition." *PASNY*, *supra* n.2, 743 F.2d at 105; *MTA*, *supra* n.4, 796 F.2d at 591-93, *citing* S. Rep. No. 539, 85th Cong., 1st Sess. 7 (1957); *Development of Power at Niagara Falls, N.Y.: Hearings Before a Subcommittee of the Committee on*

Public Works on S. 512 and S. 1037, 85th Cong., 1st Sess. 12-13 (1957). It was Congress' hope that public bodies

> would act as yardsticks by using their *supply of hydropower* to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which *regulators* could set the private utilities' rate of return.

MTA, *supra* n.4, 796 F.2d at 592 (emphasis supplied).

In this case, however, the Commission and the Court of Appeals took a new view of yardstick competition that contravenes congressional intent. First, rather than accepting Congress' view that it was the "supply of hydropower" which enables public bodies to act as yardsticks and charge lower rates, the Court of Appeals upheld the Commission's view that it was the allegedly lower distribution costs of a municipal utility which enable it to act as a yardstick and charge lower rates.[10] (21a). Second, rather than accepting Congress' view that a public body's low rates would serve as a "regulatory" yardstick -- by which regulators could set a private utility's rate of return -- the Court of Appeals upheld the Commission when it essentially repudiated that test,[11] and opted instead for a requirement that consumers, and not regulators, have the opportunity to compare rates. (73a, 88a).[12]

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[10] In fact, the distribution costs of the town of Massena's municipal utility are higher than those of Niagara Mohawk, the relevant investor-owned utility. (2631-32A, Vol. IX).

[11] The Commission adopted the ALJ's yardstick competition criteria, including the requirement that a public body "provide an opportunity for consumers [not regulators] to compare the rates and quality of service of the public utility with that of the IOU." (73a). The Commission specifically rejected petitioner's kind of competition because it "do[es] not relate to consumer rate comparisons but to 'regulatory' comparisons." (88a).

[12] The Commission found that petitioner failed to meet the new "consumer rate comparison" test because petitioner's bills to consumers showed only the savings attributable to preference power,

(Footnote Continued)

In accordance with Congressional intent, petitioner -- whose rates for hydropower did in the past and would in the future serve as a regulatory yardstick -- should be eligible as a yardstick competitor. By requiring that a public body pose a threat of displacement, substantially meet customers' energy needs and provide consumers an opportunity to make rate and quality of service comparisons, the Commission's "yardstick competition" test as upheld by the Second Circuit imposes a far more restrictive burden on public entities than the statute mandates and violates Congress' intent in enacting the NRA. *See Sullivan v. Zebley*, 110 S.Ct. 885 (1990).[13]

II. THE DEGREE OF DEFERENCE ACCORDED THE COMMISSION BY THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT.

In this case, the Commission failed to exercise its own judgment, particularly with respect to the requirement that a public body own or physically control a distribution system. The Commission based its order on the prior decision of the Court of Appeals for the Second Circuit in the *MTA* case, *supra* n.4. In *MTA*, the Court of Appeals held that despite the broad literal meaning of the term "public bodies," Congress intended the term to be limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, *supra* n.4, 796 F.2d at 591.

(Footnote Continued)
but not rates. (95a). This clearly glorifies form over substance; for consumers, it is the savings that cause their interest and motivate them to press for lower investor-owned utility rates.

[13] The Commission claims that petitioner is ineligible for public body status because petitioner's customers were also customers of a private utility, and customers of a private utility were not meant by Congress to receive preference power directly, but to benefit only indirectly, from additional competition in the marketplace (85a, 87-88a). Far from contravening Congressional intent, however, the competitive purpose of the statute is enhanced by the presence of dual suppliers. Preference power sold at retail by petitioner to consumers is not power sold to them as customers of the private utilities, but in their status as customers of petitioner, thus satisfying the Congressional purpose in enacting the NRA.

The Court of Appeals in the *MTA* case did not hold that an entity qualifies as a public body only if it owns or physically controls a distribution system; indeed, the Court of Appeals itself admits that it did not rule on "the legitimacy of the kind of leasing arrangements currently before us" in this case. (15a). Yet the Commission, in articulating its "control" criteria, concluded that the Court of Appeals' decision in *MTA* left it no choice in the matter. The Commission specifically stated that "the [*MTA*] court cited legislative history requiring that the 'public body' *must* control distribution." (86a)(emphasis supplied).[14] The Commission further noted that the "ALJ correctly found that to 'sell and distribute power directly to consumers of electricity at retail' *requires* direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity *must* have control over its distribution system." (88a) (emphasis supplied).

Although this Court has made clear that considerable deference is due an agency charged with administering a statute, so long as the agency's construction is reasonable and consistent with the language and intent of the statute, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), when an agency bases its decision on something other than its own judgment, deference is inappropriate. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-89 (1943); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986); *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985).

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[14] The Court of Appeals agreed with petitioner that neither the statute itself nor prior case law, including *MTA*, imposed eligibility criteria such as "control" of distribution. (14a). Indeed, a literal reading of the legislative history cited by the *MTA* court -- a statement by Senator Neuberger that under the NRA "the public operation will extend from the turbine to the reading lamp in the living room," *MTA*, supra n.4, 796 F.2d at 592 -- would mean that *all* functions, from generation to transmission to distribution, must be "public." Such a literal reading would disqualify many of the currently-eligible public bodies since they buy privately generated power and transmit power over the lines of investor-owned utilities. (R. 543-45). *See also Brazos Electric Power Cooperative, Inc. v. Southwestern Power Administration*, 819 F.2d 537 (5th Cir. 1987), *rehearing denied*, 828 F.2d 1083 (1987).

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Here, the Commission "did not rely upon 'its special administrative competence'" *Chenery*, *supra*, 318 U.S. at 92; or "on its own evaluation of the needs of the industry," *RCA*, *supra*, 346 U.S. at 94. Rather, the Commission relied on a mistaken reading of a Second Circuit decision. Ironically, the Second Circuit then deferred to that erroneous interpretation, bowing to the Commission's alleged expertise (14a), while claiming that "we might not have adopted these exact criteria had we analyzed these issues in the first instance" (16a). Under this Court's precedents, the Second Circuit should have remanded to the Commission because the Commission's conclusion "was not based on [its] own judgment but rather on the unjustified assumption" that the Court of Appeals had mandated the result. *RCA*, *supra*, 346 U.S. at 96. Petitioner is entitled to have the Commission exercise its independent judgment in defining a "public body".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

New York, New York
May 10, 1991

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
MAY 9 1991
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90-1721

No. 90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 369, 370, 371, 372, 373, 374, 375, 376—
August Term, 1990

(Argued October 22, 1990
Decided December 17, 1990),

Docket Nos. 89-4125, 90-4067, 90-4069, 90-4071, 90-4073, 90-4075, 90-4077, 90-4079

ALLEGHENY ELECTRIC COOPERATIVE, INC., VERMONT DEPARTMENT OF PUBLIC SERVICE, NEW YORK CITY PUBLIC UTILITY SERVICE, COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY, UPSTATE PUBLIC UTILITY SERVICES ASSOCIATION, JAMES E. O'NEIL, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE and MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioners,

-v.-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ALLEGHENY ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE, PUBLIC POWER ASSOCIATION OF NEW JERSEY, NEW YORK STATE ELECTRIC & GAS CORPORATION, CITY OF CLEVELAND, OHIO, PUBLIC SERVICE ELECTRIC & GAS COMPANY, CITY OF NEW YORK, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE and MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO.,

Intervenors.

Before:

MESKILL and ALTIMARI, Circuit Judges, and
CONNER,* District Judge.

Petitions for review of two orders of the Federal Energy Regulatory Commission. The first order affirmed the determination of an Administrative Law Judge that the allocation of Niagara River hydroelectric power to certain municipal utility companies by Power Authority of the State of New York was improper because these recipient entities did not qualify as "public bodies" within the meaning of the Niagara Redevelopment Act, 16 U.S.C. §§836-836a. The second order denied a request for rehearing.

Petitions denied.

HARVEY L. REITER, Washington, D.C.

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---

* Honorable William C. Conner, United States District Judge for the Southern District of New York, sitting by designation.

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SHELDON WHITEHOUSE, Assistant Attorney General, State of Rhode Island, Providence, RI, *for Petitioners James E. O'Neil, Attorney General of the State of Rhode Island and Rhode Island Public Utilities Commission.*

ROBERT H. SOLOMON,
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MESKILL, *Circuit Judge:*

Nine petitioners seek review of two orders of the Federal Energy Regulatory Commission ("FERC" or "Commission"). These petitions for review result from FERC's decision to affirm the findings and conclusions of an Administrative Law Judge (ALJ) concerning the Power Authority of the State of New York's (PASNY) allocation of hydroelectric power produced by the Niagara Power Project (Niagara Project) and FERC's decision to deny rehearing. Opinion No. 329; *Opinion Affirming Initial Decision,* 48 FERC ¶61,124 (July 28, 1989); *Order Denying Rehearing,* 49 FERC ¶61,068 (October 19, 1989). Niagara Project power is allocated in accordance with the terms of the Niagara Redevelopment Act (NRA), 16 U.S.C. § 836 *et seq.* The NRA mandates that PASNY, the licensee authorized to operate the Niagara Project, "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" when allocating at least fifty percent of Niagara generated power. 16 U.S.C. § 836(b)(1). The Commission's interpretation of the language of this authorization provides the basis of this appeal.

The petitioners are divided into two groups. The first group of petitioners challenges FERC's holding that in order to qualify as a "public body" a public utility must (1) provide "yardstick competition" for private investor owned utilities (IOUs), (2) be directly responsible for meeting the requirements, and responding to the concerns, of its retail customers, and (3) have control of the electrical distribution system. This group consists of Vermont Department of Public Service (VDPS), PASNY, James E. O'Neil (as Attorney General for the State of Rhode Island), and the New York Municipal Distribution Agencies (MDAs) consisting of New York City Public Utility Service (NYCPUS), County of Westchester Public Utility Service Agency (CWPUSA), and Upstate Public Utility Services Association (UPUSA). Petitioners VDPS and the MDAs also challenge the Commission's application of the "public body" criteria to them.

The second group of petitioners challenges the remedy chosen by FERC to address PASNY's violations of the terms of the NRA as well as its license. This group consists of Allegheny Electric Cooperative, Inc. (Allegheny), Connecticut Municipal Electric Energy Cooperative (CMEEC), and Massachusetts Municipal Wholesale Electric Company (MMWEC). Both groups of petitioners challenge the Commission's October 29, 1989 order denying a rehearing. The Municipal Electric Utilities Association of New York State (MEUA), and the remaining intervenors herein, support the Commission in all respects. We deny the petitions for review.

BACKGROUND

The NRA authorized and directed the Commission to issue a license under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, to PASNY for the construction and operation of a hydroelectric power project with the capacity to utilize completely the United States' rights to the water of the Niagara River. 16 U.S.C. § 836(a). PASNY is a political subdivision of New York State and is responsible for the hydroelectric development of the Niagara and St. Lawrence Rivers. The NRA further directed the Commission to impose the following as a condition of PASNY's license:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1). The fifty percent of Niagara Project power set aside for "public bodies and nonprofit cooperatives" is referred to as preference power. Those entities eligible to receive an allocation of this preference power are called "preference customers." To be a preference customer, an entity first must

qualify as a "public body." The Commission's interpretation of the statutory term "public bodies" and its application of this "public bodies" criteria to the MDAs and VDPS are the fundamental issues we must address.

The Commission, pursuant to its congressionally delegated regulatory authority under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, has the responsibility to enforce the mandates of the NRA and the conditions of PASNY's license. Through the years, FERC has been called on to examine PASNY's compliance with the terms of the NRA and the conditions of its license.

In administering the NRA, FERC has necessarily interpreted and applied the statute's provisions. Specifically, over the past decade, the Commission has given content to the statutory term "public bodies" and the courts have had the opportunity to review the Commission's construction. Indeed, we have previously reviewed issues directly related to those presented here. *See Metropolitan Transp. Auth. v. FERC,* 796 F.2d 584 (2d Cir. 1986) (*MTA*), *cert. denied sub nom., Allegheny Elec. Coop., Inc. v. FERC,* 479 U.S. 1085 (1987); *Power Auth. of State of New York v. FERC,* 743 F.2d 93 (2d Cir. 1984) *(PASNY)*. Our holdings in these cases are particularly relevant to the issues presently being raised by petitioners.

A. *Prior Circuit Precedent*

In *PASNY*, we reviewed orders of the Commission regarding the proper allocation of Niagara Project hydropower to preference customers. We discussed in detail the historical background of the Niagara Project and examined the "agonizingly long" legislative history of the NRA. *PASNY*, 743 F.2d at 98-99, 104-106. In concluding that the Commission had properly applied the preference provisions of the NRA, we held that the NRA imposed no restrictions on the type of consumer -- domestic or industrial -- to which preference power could be sold at retail and that in adopting the NRA Congress intended to incorporate the principle of "yardstick competition." *Id.* at 105. This principle "assumes that if the municipal entities [that distribute power at retail] (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all." *Id.*

In *MTA*, we were called on once again to review Commission orders dealing directly with the allocation of NRA preference power. *See Opinion No. 229*; *Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC ¶ 61,323 (Mar. 27, 1985) (*Opinion* 229); *Opinion No.* 229-A; *Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC ¶ 61,194 (July 30, 1985) (*Opinion* 229-A). The issues presented in *MTA* arose from a dispute involving many of the parties presently before us and concerned the extent to which the NRA required PASNY to allocate preference power to out-of-state public entities. The Commission found that PASNY had improperly allocated preference power to in-state entities such as the Metropolitan Transportation Authority (MTA), thereby reducing the percentage of preference power available for allocation to eligible out-of-state entities. The Commission concluded that the statutory term "public bodies" meant governmental entities that sell and distribute preference power to consumers. *MTA*, 796 F.2d at 592. Because MTA utilized its preference power directly (*i.e.*, an end-user) and did not distribute it to consumers, the Commission found MTA ineligible for the receipt of preference power.

In addition to the issues involving MTA, the legality of an allocation of Niagara power to VDPS was also before the Commission. At that time, VDPS received its allocation of preference power and then sold it directly to a private utility company for consumer resale, essentially functioning as a wholesaler of electric power. In reviewing the VDPS arrangement, the Commission, departing from its own precedent, concluded that VDPS could not qualify as a "public body" because it was not "capable of selling and distributing power directly to consumers of electricity at retail." *Id.* at 590 (quoting *Opinion No.* 229, 30 FERC at 61,651). Because VDPS neither sold nor distributed power directly to consumers at retail, the Commission concluded that VDPS did not foster the requisite "yardstick competition."

Building on our analysis in *PASNY*, we affirmed the Commission's orders that found PASNY's allocation of preference power to both MTA and VDPS to be impermissible. Once again, we carefully analyzed the legislative history of the NRA. *Id.* at 591-93. We concluded that the Commission correctly interpreted the term "public bodies" to encompass only publicly owned entities capable of selling and distributing electric power at retail. *Id.* at 593. Moreover, we held that the allocation of preference power to end-users such as MTA or to entities such as VDPS, that essentially acquired power and then resold it to a private utility for retail sale, failed to advance the NRA's statutory purpose of encouraging rate competition. *Id.* at 592.

B. *The Complaints Underlying this Appeal*

Prior to our decision in *MTA*, but in response to the Commission's order, the Vermont Legislature on April 23, 1985 enacted legislation aimed at satisfying the Commission's newly articulated "public body" definition. *See* Vt. Stat. Ann. tit. 30, § 212a. That legislation authorized VDPS to distribute and sell at retail electric power purchased from the Niagara and St. Lawrence River power projects. To accomplish this objective, the legislation authorized VDPS to enter into leasing agreements with private utility companies whereby VDPS would lease facilities from these entities and they in turn would provide VDPS with the services necessary to distribute Niagara preference power. Pursuant to this authorization, VDPS entered into a number of agreements with privately owned utilities aimed at accomplishing the sale and distribution of Niagara preference power directly to retail customers.

Similarly, in the early 1980s, a number of New York municipalities, seeking to reduce electricity rates for their citizens, formed "municipal distribution agencies" (MDAs). Pursuant to the authority conferred upon them by state and local law, the MDAs entered into contractual agreements whereby they leased electric distribution facilities from private IOUs. Through this type of leasing arrangement, the MDAs, like VDPS, sought to satisfy the Commission's "public body" definition.

On July 1, 1985, PASNY began to sell Niagara preference power to a number of New York MDAs. These allocations had the effect of reducing the amount of preference power available to other New York preference customers such as the members of the MEUA. On February 14, 1986, MEUA filed a complaint against PASNY with FERC. MEUA charged that the lease and operating agreements (LOAs) entered into by the New York MDAs with private utility companies did not qualify the MDAs as "public bodies" as defined by the Commission and this Court and that PASNY's decision to allocate preference power to the MDAs, therefore, violated the terms of its license and the NRA. Subsequently, on March 13, 1986, CMEEC and MMWEC filed similar complaints challenging PASNY's decision to allocate preference power to VDPS. The Commission consolidated the two complaints and ordered an evidentiary hearing before an ALJ.

C. *The ALJ's Findings and Conclusions*

After an administrative hearing that encompassed more than one year and a review of thousands of pages of evidence, the ALJ issued his decision. *Initial Decision,* 42 FERC ¶ 63,018 (Feb. 16, 1988). The ALJ found that neither the New York MDAs nor VDPS qualified as a "public body" entitled to an allocation of Niagara preference power. *Id.* at 65,170, 65,172. In making this finding, the ALJ concluded that the use of leasing agreements does not in itself make a public entity ineligible for the receipt of preference power. Indeed, the ALJ found that a publicly owned entity can satisfy the "public body" test by leasing electric distribution facilities, but only if the public entity satisfies certain criteria. *Id.* at 65,163-64.

First, the public entity must provide "yardstick competition" for private investor owned utilities. The ALJ reasoned that to perform this function a "public body" must provide both consumers and regulators with a "benchmark" with which to compare the rates and quality of service offered by private utility companies. In his decision, the ALJ articulated a three step analysis to determine when a publicly owned entity functions as a "yardstick competitor:"

(a) it creates a threat of takeover or displacement of private investor owned utilities;

(b) it substantially meets the energy needs of its customers; and

(c) it provides consumers and regulators with a basis for comparing the rates and quality of service of public and private utilities.

Id. at 65,164. Second, the publicly owned entity must be directly responsible for meeting the requirements and responding to the concerns of its retail customers, and it must have the ability to initiate corrective action. *Id.* Third, the entity must have "control" of the distribution system. The ALJ defined control as the authority to "manage a system without restraint." *Id.* at 65,165. Specifically, the entity must have the ability to adopt cost cutting measures and to ensure continuity of service. Applying this standard, and focusing on the question of control over distribution instead of generation, the ALJ concluded that neither the New York MDAs nor VDPS qualified as a "public body."

Regarding the MDAs, the ALJ found that the terms of their lease agreements failed to shift the ultimate responsibility for the provision of electrical service away from the private utilities. *Id.* at 65,169-70. Indeed, the private utility maintained exclusive physical control over the distribution facilities and reserved the right to terminate the LOAs in certain circumstances. Finally, the ALJ concluded that the bills sent to consumers failed adequately to inform them of the source, price and nature of the service being offered by the MDAs. The bills only contained a notation that the consumer was saving a specified amount as a result of the availability of preference power and did not make it sufficiently clear to consumers who, in fact, was providing the service.

With regard to VDPS, the ALJ concluded that it came closer than the MDAs to satisfying the "public body" test because VDPS had the ability to provide its service to virtually any resident upon request. *Id.* at 65,171-72. The ability to provide service, however, was counterbalanced by the need for a resident to be a customer of a private utility as a prerequisite to obtaining VDPS service. The responsibility for billing, metering, delivery and virtually all other services also remained with the private utility. Thus, the ALJ found that VDPS bore no direct responsibility to its customers. Finally, the private utility maintained exclusive control over the physical plant and distribution facilities and indemnified VDPS from tort liability. These factors led the ALJ to conclude that VDPS did not satisfy the "public body" test.

The ALJ did not grant any retroactive relief and deferred to the Commission on the question of prospective relief. *Id.* at 65,173.

D. *FERC's Review and Decision*

On review, the Commission affirmed the ALJ's findings and adopted his reasoning. *See Opinion No.* 329, 48 FERC ¶ 61,124. In addition, the Commission rejected complainants' proposed remedy. Complainants had sought to impose a requirement on PASNY to obtain Commission approval prior to allocating preference power in the future. Instead, the Commission decided that in the future PASNY must engage in a careful examination of the public entities that seek to acquire preference power. Additionally, PASNY must make an informational filing outlining the sections on which it has relied to conclude that an entity to which it proposes to sell preference power qualifies as a public body. *Id.* at 61,478.

DISCUSSION

Petitioners collectively advance several challenges to FERC's *Opinion No.* 329. Petitioners PASNY, VDPS and the New York MDAs challenge the Commission's "public body" criteria on two grounds: (1) the criteria are contrary to law, and (2) the criteria adopted are neither reasoned nor supported by substantial evidence. VDPS and the MDAs also assert that assuming the propriety of the new criteria, the Commission erred when applying the test to each of them. In addition, petitioner Rhode Island submits that states are exempt from the Commission's "public body" test. Petitioners Allegheny, CMEEC and MMWEC challenge FERC's refusal to impose on

PASNY a requirement that all future allocation decisions be subject to prior FERC approval.

A. *The Scope of Review*

Petitioners challenge the Commission's interpretation of the language of the NRA and the factual findings of the ALJ. Petitioners submit that in formulating the "public body" test the Commission misconstrued the NRA. As previously noted, FERC is the agency that is responsible for administering the NRA. When questions involving statutory construction arise, "great deference" must be accorded "to the interpretation given the statute by the officers or agency charged with its administration." *PASNY*, 743 F.2d at 103 (quoting *Connecticut Fund for Environment, Inc. v. EPA*, 696 F.2d 169, 173 (2d Cir. 1982)). As the Supreme Court has declared, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*) (footnote omitted). Therefore, unless the statutory language is clear and unambiguous, a reviewing court must defer to a reasonable administrative interpretation. *Id.* at 842-44. *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987).

Petitioners also contest the factual findings of the ALJ. They submit that even if we conclude that the Commission's "public body" criteria are not contrary to the NRA, the determination that VDPS and the MDAs failed to satisfy these criteria was the product of unreasoned decisionmaking and was not supported by "substantial evidence." Section 313 of the Federal Power Act, *as codified*, 16 U.S.C. § 825l(b), expressly provides: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." See also 5 U.S.C. § 706(2); *PASNY*, 743 F.2d at 110-11. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Federal Power Act's substantial evidence test "is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings." *Maryland People's Counsel v. FERC,* 761 F.2d 768, 774 (D.C. Cir. 1985). Thus, we must determine "whether [FERC's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). In applying this standard, we must be able to discern from the record the basis for the Commission's actions. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, *reh'g denied*, 332 U.S. 783 (1947).

With these standards in mind, we turn to the issues raised by petitioners.

B. *"Public Body" Criteria*

1. *Consistency with the NRA*

Initially, we must determine whether the Commission's "public body" criteria are consistent with the language and purpose of the NRA and with our prior decisions. Petitioners challenge the Commission's three pronged "public body" test, asserting that "public body" criteria are not mandated by the NRA and are inconsistent with the statute's purpose. Specifically, petitioners contend that two of the "yardstick competitor" elements — meeting the substantial needs of the public entity's customers and posing a threat of takeover to private entities — are "inventions" of the Commission, without any basis in law.

Petitioners advance several arguments in support of their position that the "public body" criteria undermine the very purpose of the NRA and are inconsistent with our prior decisions. First, they argue that through their leasing arrangements they possess the capability to distribute power at retail, thereby satisfying the definition of "public body" adopted in *MTA*. Second, they contend that the Commission misapplied the principle of "yardstick competition." Specifically, they note that their rates are a matter of public record and can serve as a comparative benchmark when regulators set a private utility's rate of return. They argue that a "public body" need not create a threat of physical takeover or serve substantially all of its customers needs to provide yardstick competition. Third, petitioners assert that it is not necessary for a public entity to "control without restraint" the distribution system. They submit that in adopting this criterion, the Commission has imposed a *"de facto"* ownership requirement. We find petitioners' arguments to be unavailing.

Petitioners are correct in noting that the statute itself does not impose these strict standards and that prior case law has not expressly imposed such eligibility criteria. Indeed, the term "public body" is not defined in the NRA. The absence of an express statutory mandate or a direct pronouncement of law by the courts, however, does not preclude an agency from adopting standards that it deems essential to the effective implementation of the statute it has been directed to administer. An agency must have the latitude to adopt standards that may evolve over time as long as those standards are consistent with the statute's purpose and are not contrary to law.

In an instance such as this, where Congress has not directly addressed the precise question at issue, a reviewing court "does not simply impose its own construction on the statute .... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnotes omitted). Congress entrusted the Commission with the responsibility for the administration of the NRA. The Commission, due to its cumulative experience and expertise, is particularly well suited to this task. Unless the Commission's interpretation is inconsistent with the plain language of the statute or with the intent of Congress, we will defer to the Commission's construction as long as it is "reasonable." *Id.* at 845.

Here, the ALJ methodically examined the leasing arrangements entered into by the New York MDAs and VDPS. In reaching his decision, the ALJ placed great reliance on our opinion in *MTA*. In that opinion, Judge Mansfield stated: "Literally, the term 'public bodies' is not limited to 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.' However, the legislative history of the NRA demonstrates that that is what Congress intended the term to mean." *MTA*, 796 F.2d at 591.

Thus, we have expressly accepted the proposition that in order to qualify as a "public body" an entity must actually deliver its energy to retail customers. Consumers will benefit from the existence of "preference power" only if that power is made available through the market for consumer purchase. As we have noted, "[i]f the 'public body' used the preference power itself, the privately-owned [utilities] would not face any pressure to reduce the prices they charge other customers." *MTA*, 796 F.2d at 592. Similarly, the sale of this preference power directly from a public entity to a private company for resale to the public fails to create any sort of competitive pressures on the private utility. *Id.*

In *Opinion 329,* the Commission emphasized the importance of maintaining the competitive scheme initially envisioned by Congress wherein the customers of private utilities would not receive preference power directly, but rather would indirectly receive the benefits in the form of lower rates spurred by increased competition. As the Commission explained:

> Congress did not intend the customers of IOUs to receive preference power, but rather mandated that they receive the benefit indirectly through the lower rates the private utilities would charge in response to the competition from the public bodies receiving preference power. Thus, the MDAs' and VDPS's argument that they can give a greater number of end-users access to the power is irrelevant if the MDAs and VDPS do not themselves sell and distribute the power directly to the retail consumer, but instead are giving that access to the customers of IOUs.

48 FERC at 61,467.

The test articulated by the ALJ and adopted by the Commission is an attempt to clarify further the requisite characteristics of a "public body." In *MTA*, we noted that FERC has expressly declined to rule on the legitimacy of the kind of leasing arrangements currently before us. 796 F.2d at 591. We, therefore, did not rule on the issue. Given our silence, the ALJ undertook a detailed inquiry into the nature of the leasing arrangements entered into by the New York MDAs and VDPS.

The ALJ engaged in a careful analysis and rendered a thoughtful decision expanding on concepts we initially articulated in *PASNY* and *MTA*. In those cases, we emphasized the importance of direct retail distribution of Niagara preference power and focused on the benefits of competition. Here, the Commission reasoned that competitive benefits cannot fully be realized when a public entity simply enters into an arrangement with a private utility to distribute preference power, unless that public entity has an active role in the day-to-day distribution operations. The lease arrangements before the Commission vested the lessee public entities with few if any substantive rights. Rather, these agreements essentially provided the lessees with the right to pass their preference power on to consumers through a private utility's distribution system. The Commission concluded that such agreements do not provide private utilities with any incentive to achieve cost reductions or operating efficiencies.

VDPS, the MDAs and PASNY submit that the Commission's adoption of the "public body" criteria will actually result in reduced competition because LOAs allow for public entities to compete without having to expend vast sums to acquire distribution facilities. As petitioners have argued:

> Satisfying FERC's requirements of control without restraint, meeting the substantial needs of the utility's customers and posing a threat of takeover require such huge expenditures of public funds that few, if any, public utilities would try to meet the criteria in order to qualify for the limited amounts of preference power available.

We think petitioners have overstated their case. Ownership is not required by the Commission. Indeed, LOAs that afford the lessee operational control would satisfy the test.

Although we might not have adopted these exact criteria had we analyzed these issues in the first instance, the Commission's construction of the statutory term "public bodies" is not so unreasonable as to amount to an arbitrary and capricious action. In reviewing the Commission's construction, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11 (citations omitted).

The Commission's "public body" test strikes a delicate balance. While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved. We therefore find FERC's "public body" test to be consistent with the purposes of the NRA and the reasoning of our prior decisions.

2. *The Factual Findings*

Petitioners also challenge the factual findings that provided the basis for *Opinion No. 329.* They submit that the ultimate conclusions of the Commission are unsupported by the evidence and amount to "arbitrary and capricious" action. Specifically, VDPS and the MDAs assert that even assuming the correctness of the "public body" criteria, the Commission's finding that they did not satisfy these criteria was not supported by substantial evidence and was an exercise of unreasoned decisionmaking. Petitioners argue that the ALJ and the Commission failed to address adequately in their respective opinions the factual evidence that was introduced. Additionally, they assert that the Commission has imposed a "*de facto*" ownership requirement and that this represents an unexplained change in policy. Finally, petitioners contend that the Commission failed to consider several relevant factors when adopting the "operational control" component of the "public body" test. We find these arguments to be without merit.

Initially, we note that the record of the proceedings before the ALJ consists of thousands of pages. Both the petitioners and the complainants below introduced documentary and testimonial evidence. Nothing in the record suggests that the ALJ did not carefully consider and evaluate all the evidence before rendering his decision. Indeed, the ALJ's decision indicates that the contrary is true.

The assertion that the Commission failed to consider evidence presented by petitioners simply is not supported by the record. Indeed, the factual findings of the Commission encompass all of the specific points now being raised. Both the ALJ and the Commission carefully considered each of the factors on which the petitioners presently rely. These challenges to the application of the "public body" test in our view are nothing more than veiled attempts at collaterally attacking the "public body" criteria.

Moreover, we find no basis for the argument that the Commission in some way abdicated its responsibility by adopting the ALJ's findings and conclusions. After reviewing *Opinion No. 329,* we are satisfied that the Commission evaluated the ALJ's decision and all the arguments advanced by the parties and that all its ultimate conclusions were supported by substantial evidence.

a.*The MDAs and the "Public Body" Test*

The MDAs submit that their LOAs with the IOUs satisfy the "public body" criteria. Specifically, they assert that they (1) provide "yardstick competition," and (2) that the LOAs provide them with a sufficient degree of control over the distribution of power. Regarding the first point, the MDAs contend that the Commission ignored the fact that they compete directly with IOUs and that each kilowatt hour sold by a MDA is a kilowatt hour lost to an IOU. Additionally, they note that their rates are a matter of public record and are therefore available for regulatory comparison. Finally, the bills received by MDA customers reflect the difference in cost resulting from the provision of MDA power instead of IOU power. With regard to the second point, the MDAs submit that the record demonstrates that they maintain a high level of control over distribution. Specifically, they select their customer base, determine the amount of power to be sold to each customer, and set their own rates.

The LOAs entered into by the MDAs were a part of the record and the subject of close examination. In particular, the Commission analyzed the terms of the lease and operating agreement entered into by NYCPUS (one of the MDAs) and

Consolidated Edison Co. (Con Ed) — a New York based IOU. Because the terms of the LOAs entered into by the other MDAs paralleled those of the NYCPUS/Con Ed agreement, the Commission focused its attention on this one agreement. *Initial Decision*, 42 FERC at 65,169. The Commission reached several conclusions. First, the ultimate responsibility for control of distribution remained with Con Ed. Indeed, the LOA expressly provided that Con Ed retain the franchise responsibility for providing service and that it be vested with the "exclusive control" over the entire distribution system. Second, Con Ed functioned as the operating agent for NYCPUS with responsibility for billing, metering and collection. Third, Con Ed retained the right to suspend the LOA in the event that provision of preference power resulted in higher energy costs for consumers. Fourth, Con Ed reserved the right to terminate the LOA if the MDA initiated condemnation proceedings or if compliance with the agreement would result in an increase in Con Ed's rates or a reduction in net income available for stockholders below the level that would pertain in the absence of the LOA. Fifth, a prerequisite to receipt of "preference power" was being a customer of Con Ed. *See Opinion No. 329,* 48 FERC at 61,471.

All of these conditions were expressly enumerated in the LOA. The Commission reasonably concluded that to compete with IOUs public entities must have the ability to manage and change those variables that affect costs and service. These LOAs provided no such flexibility. Instead, all responsibility for operations rested with the IOU. As the Commission appropriately explained:

> In addition . . ., the consumer must be a customer of the privately owned utility, or service is not available. Thus, the consumer has no real choice between utilities. There is insufficient separation of functions between the MDAs and the IOUs to create a threat of displacement, to allow the MDAs substantially to serve their customers' needs, or to provide an opportunity for rate comparison.

Id.

Given the express conditions of the LOAs and in light of the entire record, we conclude that there was substantial evidence in the record to support the Commission's conclusion that the MDAs lacked the requisite degree of control over distribution. As discussed above, we agree with the Commission that the exercise of such control is essential to a finding of "public body" status.

b. *Applying the "Public Body" Test to VDPS*

Petitioner VDPS attacks the Commission's finding that it fails to qualify as a public body, challenging the Commission's decision regarding the "yardstick competition" prong of the "public body" test. VDPS asserts that it clearly satisfies this test because it supplies a substantial percentage of Vermont residents' electricity needs. VDPS also submits that it presents a clear competitive threat to IOUs and that billing statements clearly identify VDPS as the source of a customer's power.[1] Finally, VDPS, like the MDAs, submits that the LOAs provide it with a "sufficient" degree of control over distribution.

VDPS entered into LOAs with various IOUs in Vermont for the purpose of distributing Niagara preference power to consumers. Under these LOAs, VDPS obtains the right to use of the IOUs' distribution facilities. However, like the MDAs, VDPS has no responsibility for the maintenance, construction, or operation of the distribution facilities. The billing, metering and collection responsibilities are also performed by the IOUs. "In short, the distribution and customer service functions that a customer expects . . . are performed by the [IOUS], not by VDPS." *Id.* at 61, 474. Most importantly, the Commission concluded that under lease arrangements like those entered into by VDPS and the MDAs, the public entities essentially are precluded from competing with the IOUs on a cost basis. As the Commission stated in reference to VDPS's arrangement:

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[1] With regard to the issue of rate comparisons, VDPS argues that the Commission improperly refused to consider a statute passed by the Vermont Legislature on May 27, 1987. *See* Vt. Stat. Ann. tit. 30, 212(f). This legislation directs that all electric bills provide consumers with information regarding the amount of electricity supplied by VDPS and the price per kilowatt hour of the VDPS electricity. The legislation was passed after the close of the administrative record in this case. The ALJ took official notice of this statute, but did not permit its introduction into the record. The Commission also declined to allow it into the record. We agree with the Commission that this evidence was irrelevant because the statute was not in place at the time of the challenged allocations of preference power. Moreover, FERC has a great deal of discretion over when to close an administrative record. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978).

> [S]ince VDPS leases its distribution facilities from the IOUs, and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus no benchmark is possible, and VDPS does not foster yardstick competition.

Id. Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the objective of the NRA, it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective.

As in many cases, VDPS points to parts of the record that tend to undermine the Commission's conclusions. However, we are acutely aware that the ALJ was charged with the responsibility of resolving these apparent inconsistencies. After a thorough review of the record, we conclude that the Commission's determination that VDPS's leasing agreements failed to satisfy the "public body" test was supported by substantial evidence.

C. *Rhode Island's Argument*

The State of Rhode Island does not challenge the substance of the Commission's "public body" test; rather, it asserts that the test should not apply to states. Rhode Island argues that the test undermines the role of the states under the NRA. Specifically, Rhode Island takes exception to the criteria that must be met to qualify as a "public body." Rhode Island argues that the term "public body" necessarily encompasses states and that states should not have to engage in the sale of preference power to retail consumers in order to obtain an allocation of preference power under the NRA.

In support of this argument, Rhode Island points to specific language in the NRA that permits ten percent of the Niagara Project's "preference power" to be allocated "for use within reasonable economic transmission distance in neighboring States." 16 U.S.C. § 836(b)(2). The statute goes on to provide: "The arrangements made by the licensee [PASNY] for *the sale of power to or in such States* shall include observance of the preferences in paragraph (1) of this subsection." *Id.* (emphasis added). From this and similar language in the statute, Rhode Island surmises that states were among the intended beneficiaries of the NRA and that states are statutorily entitled to an allocation of preference power even if they do not directly sell power to consumers at retail. We disagree.

We see no indication that Congress intended states to be treated differently from other municipal and public utilities. The NRA's primary objective is to encourage rate competition with private investor owned utilities so that consumers can benefit from reduced electric costs. To treat states differently from other public entities would undermine this statutory purpose. Indeed, our analysis in *MTA* directly addresses the arguments being advanced by Rhode Island. In *MTA*, we held that an allocation of preference power to the "end-users" fails to advance the NRA's objective of enhancing rate competition. We concluded that to be a "yardstick competitor" a recipient of an allocation of preference power must sell directly to retail consumers. Nothing in our opinion suggested that any entity, including a state, was to be exempt from this requirement. As we unequivocally stated:

> Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

MTA, 796 F.2d at 592. Similarly, an allocation of preference power to a state to distribute the energy as it sees fit does not advance the statute's purpose. We therefore reject Rhode Island's invitation to carve out an exception for states and we see no justification for treating a state more favorably than any other public entity.

Rhode Island also advances various Federalism-based arguments to support its position that states should be treated differently from other public entities. We have considered those arguments and find them to be unpersuasive.

D. *FERC's Denial of Prospective Relief*

When the Commission affirmed the findings and conclusions of the ALJ, it chose not to impose the prospective relief sought by petitioners Allegheny, CMEEC and MMWEC. These entities sought to have imposed on PASNY a requirement that it obtain FERC approval prior to allocating preference power to entities other than rural electric cooperatives and traditional retail municipal electric utilities in the future. Allegheny, CMEEC and MMWEC asserted that such a remedy was appropriate because of PASNY's repeated failure to comply with previous FERC and court rulings when making its allocation decisions. The Commission ordered that PASNY must make an informational filing with the Commission ninety days prior to the effective date of an allocation. This filing must outline the determinations on which PASNY has relied to conclude that the entity to which it proposes to sell preference power qualifies as a "public body." *Opinion No. 329*, 48 FERC at 61,478.

As we have stated on a prior occasion, the Commission has "broad discretion in determining what relief is appropriate to remedy a violation of the NRA" and "the remedy should be reasonably commensurate with the needs of the case." *PASNY*, 743 F.2d at 112. Here, the ALJ found that PASNY had acted in good faith. Given this finding, the Commission's decision not to require PASNY to obtain prior approval before allocating preference power did not constitute an abuse of discretion. Indeed, we think the Commission properly balanced all the factors that were before it and fashioned a thoughtful and appropriate remedy which may adequately accommodate and protect the interests of all the parties involved.

CONCLUSION

We therefore conclude that the Commission's newly articulated "public body" test is consistent with the history and purpose of the NRA. The Commission's findings that VDPS and the MDAs as currently constituted are ineligible for the receipt of Niagara preference power were supported by substantial evidence. Additionally, we reject Rhode Island's contention that states should be exempt from the "public body" test. Finally, we agree with the Commission's choice of remedies.

The petitions for review are denied.

United States of America

Federal Energy Regulatory Commission

Municipal Electric Utilities Association of New York State et al., Docket No.

EL86-24-000 et al.

Initial Decision

(Issued February 16, 1988)

Jacob Leventhal, Presiding Administrative Law Judge.

Appearances

Wallace L. Duncan, J. Cathy Lichtenberg, Jeffrey C. Genzer and Warren L. Lewis on behalf on Municipal Electric Utilities Association of New York State.

Robert Weinberg and Janice Lower on behalf of Allegheny Electric Cooperative, Inc.

Algird F. White, Jr., Barbara S. Brenner, and Richard A. Frankel on behalf of Bethlehem Steel Corporation, *et al.*

Reuben Goldberg, Channing D. Strother, June W. Wiener, and William M. Ondrey Gruber on behalf of the City of Cleveland, Ohio.

Donald R. Allen, Alan I. Robbins, and Sharon K. Ochs on behalf of Colorado River Energy Distributors Association (CREDA).

Donal F. McCarthy, John D. McMahon, and Elisabeth S. Harding on behalf of Consolidated Edison Company of New York, Inc.

Philip R. Ehrenkranz, Michael T. Mishkin, and James L. Trump on behalf of the Cleveland Electric Illuminating Company.

Andrea L. McArdle, Stacey Dolgin, and Henry J. Logan on behalf of County of Westchester Public Utility Service Agency.

David R. Straus and Scott H. Strauss on behalf of Massachusetts Municipal Wholesale Electric Company, and Connecticut Municipal Electric Energy Cooperative.

Michael Sullivan, Sherry L. Powell, Wendy M. Lane, Arthur T. Cambouris, and Barry R. Fischer on behalf of New York Power Authority.

Daniel W. Rosenblum, Robert G. Grassi, and Michael S. Sparer on behalf of New York City Public Utility Service.

John H. Stenger and David G. Brock on behalf of Niagara Mohawk Power Corporation.

Paul M. Donovan, Lynda J. L. Calore, and Jean C. Godwin on behalf of Port Authority of New York and New Jersey.

Kenneth M. Jasinski on behalf of New York State Electric & Gas Corporation.

Robert J. Glasser and Victor A. Rogue on behalf of Orange and Rockland Utilities, Inc.

Christine P. Benagh, Carl R. Steen, Richard N. George, and John J. Diehl on behalf of Rochester Gas and Electric Corporation.

Bruce A. Tassan and Kirk Howard Betts on behalf of Public Power Association of New Jersey.

Shawn P. Leyden, James R. Lacey, and Hugh Mahoney on behalf of Public Service Electric and Gas Company.

Howard J. Read on behalf of Upstate Public Utility Services Association.

Harvey L. Reiter, William I. Harkaway, and Michael Marks on behalf of Vermont Department of Public Service.

Philip L. Chabot, Jr. on behalf of Village of Ilion, New Jersey.

Linda Lee, John J. Bartus, and Richard Miles on behalf of the Federal Energy Regulatory Commission Staff.

Procedural History

On February 18, 1986, the Municipal Electric Utilities Association of New York State ("MEUA") submitted for filing a complaint and motion for summary disposition against the Power Authority of the State of New York ("PASNY"). MEUA alleged that PASNY was illegally providing "preference" power from the

Niagara Project to so-called Municipal Distribution Agencies ("MDAs"), that are not valid "public bodies" pursuant to the Niagara Redevelopment Act, 16 U.S.C. § 836, *et seq.* ("NRA"). MEUA subsequently filed an amended complaint on March 18, 1986, to withdraw a claim for punitive damages. On March 28, 1986, the FERC issued its Notice of Complaint and established April 28, 1986, as the date for filing protests, comments or motions to intervene.

On March 13, 1986, the Connecticut Municipal Electric Energy Cooperative ("CMEEC") and the Massachusetts Municipal Wholesale Electric Company ("MMWEC") also submitted for filing a complaint against PASNY before this Commission. CMEEC and MMWEC alleged that PASNY was illegally providing preference power from the Niagara Project to the Vermont Department of Public Service ("VDPS"), and that this was also a violation of the NRA. On March 28, 1986, the FERC issued its Notice of Complaint and established April 28, 1986, as the date for filing protests, comments or motions to intervene.

By Order of June 13, 1986, the Commission consolidated the complaints of MEUA and CMEEC/MMWEC and set the case for hearing. *MEUA v. PASNY, et al.*, 35 FERC ¶ 61,333 (1986). In addition, the June 13, 1986 Order granted several interventions. Although notice of the CMEEC and MMWEC complaint was issued on March 28, 1986, it was accidentally not published in the Federal Register, so the Commission extended the opportunity to file comments and motions to intervene until July 10, 1986. 35 FERC at 61,756. In an Order issued July 30, 1986, additional interventions were granted. *MEUA v. PASNY*, Docket No. EL86-24-00 *et al.* Order Disposing of Interventions (July 30, 1986). The Commission set forth the following legal issues for determination:

> (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
>
> (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?

> (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

35 FERC at 61,758.

A prehearing conference in this proceeding was held on July 25, 1986. At that time, a procedural schedule was established. A number of other prehearing conferences were held disposing of discovery matters, procedural motions, and motions to strike testimony. The hearing was conducted from February 25, 1986, to March 23, 1987. Pursuant to a procedural order issued orally at the close of the hearing (Tr. 3184), the parties filed Initial Briefs by May 8, 1987. Reply Briefs were filed June 22, 1987.

A. *Essential Characteristics of a Niagara Redevelopment Act ("NRA") Public Body*

In accordance with the directive stated in the order setting this case for hearing, the parties submitted testimony and briefs in order to distill the standards enunciated by the Commission into a set of "interrelated, essential characteristics of an NRA 'public body'." Public Systems I.B. at 3. The parties do not dispute that the Commission has held that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA." *Massachusetts Municipal Wholesale Electric Company et al. v. Power Authority of the State of New York*, Opinion No. 229, 30 FERC ¶ 61,323, at 61,651 (1985). However, the parties disagree greatly in their specific elaborations of the criteria for being an NRA public body.

Position of the Parties

MEUA has joined with four other public systems, City of Cleveland; CMEEC and MMWEC and Public Power Association of New Jersey (collectively referred to as Public Systems) in a brief on the issue of "public body" criteria. The parties above endorse the criteria advanced by Public Systems' witness, Dr. Gordon Taylor, in this proceeding that an NRA public body must be:

(1) a publicly-owned electric utility in the electric power retail distribution business directly serving

retail customers in place of or displacing a private utility;

(2) directly responsible to retail customers for the delivery of power, including the quality and reliability of local delivery service, with direct operating control of distribution facilities sufficient to serve the full requirements of its customers;

(3) directly responsible to retail customers and in control of the acquisition and sale of power to meet their full requirements and load growth needs;

(4) providing distinguishable electric power distribution service, including both the delivery and sale of power directly to retail consumers; and

(5) an NRA yardstick competitior: an entity which serves as a model to other communities of the type of public agency which they can form to displace the privately-owned distribution utility company serving them.

MEUA I.B. at 8.

According to Public Systems, these criteria are consistent with Congressional intent that "preference power be used to foster the development of a more pluralistic, competitive retail electric distribution industry." Public Systems I.B. at 8. The presence of publicly-owned distribution alternatives creates competitive pressure on the privately owned distributors which forces the privately owned systems to be more efficient and to lower their rates. From this, Public Systems witness, Dr. Taylor, concludes that one of the criteria for public body status is that the publicly-owned utility must directly serve retail customers in place of or displace a private utility. *Id.* at 9. Dr. Taylor reasons that this is because "complete displacement is the only way the public agency utility can reduce distribution costs, profits, and prices." Ex. PS-161 at 12. In this respect it is argued that customers of both publicly and privately owned systems will ultimately benefit. Public Systems I.B. at 12.

Public Systems says that the criteria that NRA public bodies must have control and direct responsibility for distribution facilities and for the acquisition and sale of power sufficient to serve the full requirements of its customers is also based on Congress' intent to promote competition. Without direct control and responsibility for the full requirements of retail consumers Public Systems argues, there would be a mere "pass-through by the public entity of the distribution costs of the privately-owned operator of the facilities, without any cost savings." Ex. PS-161 at 150; Public Systems I.B. at 10-12.

Dr. Taylor also postulates that the criteria requiring "distinguishable" distribution service and "NRA yardstick competition" are necessary for fostering the competitive threat envisioned by Congress. The result being to force privately-owned utilities to "cut costs and accept lower profits, leading to lower rates. . . ." Public System I.B. at 12; see also, Tr. 782. Dr. Taylor summarizes the basis for these criteria as follows:

> Congress, in passing the NRA, was carrying out federal preference policy. The federal preference policy has as its objective, to support the existing public utility retail distribution systems and also to support newly created ones. The concept is that if those are supported, then they will be able to continue in business . . . independent from the private utility monopolies which they have displaced. If they are able to be successful, they will be able to lower the costs of distribution and thereby provide an alternative to the citizen customers of the private utility monopolies and achieve the benefits of competition of lower rates and better quality service, both for their own customers and for the customers of the private utilities because they will face, from the example of these yardstick competitors, . . . the potential of being taken over unless their performance is comparable.

Tr. 757-58.

Dr. Taylor's analysis is also based on the Commission's findings in Opinion Nos. 229 and 229-A [32 FERC ¶ 61,194] and the Second Circuit's ruling in *Metropolitan Transportation*

Authority ("MTA") v. FERC, 796 F.2d 584 (2nd Cir. 1986), *cert. denied,* U.S. , 107 S. Ct. 1286 (1987).

Public Systems notes that an NRA public body must serve the needs of the ultimate consumers. Public Systems cites Opinion No. 229-A which held that VDPS was not a "public body" because it merely "arranged for distribution services," and "did not 'engage' in such services in the sense of being the party directly responsible for the needs of the consumers served," 32 FERC at p. 61,444. Public Systems draws the conclusion that a utility that sells power but does not directly distribute power is only a "conduit" not engaging in the distribution but only arranging for distribution. Public Systems also notes that a "key goal" of preference power involves the promotion of yardstick competition which a "public body" should be capable of fostering, see 30 FERC at 61,650; 32 FERC at 61,444, 61,450 n. 6. In addition, Public Systems points out that the Commission intended that neither investor-owned utilities nor their customers may benefit directly from the preference power. 32 FERC at 61,444; Public Systems I.B. at 4-5.

Public Systems goes on to point out that these determinations were affirmed in *MTA v. FERC.* The standards for recognition as a public body are:

> (1)engaging in direct retail sales; (2) engaging in direct retail distribution; (3) assuming direct responsibility for retail customer needs; (4) being capable of fostering "yardstick competition;" and (5) not providing benefits to investor-owned utilities or their customers, are the basic criteria which VDPS and MDAs must meet to achieve NRA "public body" status.

Public Systems I.B. at 6-7.

PASNY does not dispute that public bodies are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MMWEC v. Power Authority,* 30 FERC ¶ 61,323, at 61,651 (1985); *MTA v. FERC,* 796 F.2d at 590; PASNY I.B. at 23. However PASNY derives a different set of criteria from this definition than do Public Systems.

PASNY first recognizes that a criterion for NRA public body status is the distribution of electricity at retail. PASNY argues that the extent of that distribution is not determined and that "[n]either the NRA, nor any of its present interpretations, mandates that retail distribution occur throughout a defined area or that all of the needs, present or future, of an entity's customers be satisfied. What is required is distribution at retail." PASNY I.B. at 23. In short PASNY states that "the NRA requires retail distribution of preference power, it does not prescribe a particular retail distribution formula." *Id.* at 24.

The second criterion proposed by PASNY involves its interpretation of "capability" to distribute at retail as required by the Commission and the Court. PASNY argues that "[s]ince the MDAs and VDPS . . . have opted to serve the partial needs of their customers, all they need to be capable of is providing a level of service sufficient to accomplish that task." *Id.* at 25-26. This is in contrast to Public Systems' criteria which require control and responsibility over electricity sales and distribution. PASNY says that because MEUA's members have chosen to serve the full needs of their customers, those public bodies need the capability to accomplish that end. *Id.* at 25. PASNY essentially argues that the level of control and responsibility should be commensurate with its obligations. PASNY rejects Public Systems' witness Taylor's requirement that a public body meet the full requirements, including increased future demand, of retail customers. PASNY argues that such a rigid interpretation should not be employed, and that witness Taylor's requirement that a public body maintain responsibility for direct operating control of facilities to serve the full requirements of customers is misplaced. PASNY asserts that Congress intended to allow localities to "customize their utility responsibilities to meet their own self-determined needs," and that the laws of New York and Vermont do not require the displacement of private utilities. *Id.* at 29. PASNY contends that "[i]t would be ludicrous to impose an artificial requirement that the MDAs or VDPS maintain a level of 'capability' identical to that of other public bodies which own their own distribution systems and have chosen to serve all of the needs of their customers." *Id.* at 26.

PASNY proposes a third criterion which involves the distribution of electricity at retail directly to consumers. Addressing the issue of direct distribution, PASNY adopts the testimony of witness Bower who stated (Tr. 1522): "as long as you get it [the electricity] to them [the retail consumer], you sell it to them, you deliver it to them, or have it delivered to them, you are . . . distributing directly." PASNY I.B. at 31. PASNY says that Dr. Taylor interprets the word "directly" to preclude the use of private utilities as delivery agents for MDAs and VDPS. This characterization is rejected by PASNY as being in conflict with the Commission's determinations that ownership of a distribution system is not required by the NRA and that the Commission did not intend to bar the use of another's system by lease or contract. Citing *Power Authority v. FERC*, 743 F.2d at 105, PASNY also argues that local entities and their voters should be given broad discretion in determining the retail distribution of preference power sold to them. PASNY I.B. at 31-32. To this end PASNY asserts that:

> The voters of New York State, representing 96% of the State's residential population, and the Legislature of the State of Vermont, representing the entire State, have determined overwhelmingly to create the MDAs and reconstitute VDPS and thereby attempt to reduce electricity costs to the citizens. The level of 'capability', 'control', 'responsibility' and 'directness' inherent in the MDA and VDPS concepts was specifically approved by these actions. These expressions of the voters and Legislature should not be cast aside in blind homage to the rigid, self-serving standards complainants would impose.

Id. at 32.

PASNY does not propose that yardstick competition is an applicable criterion as do MEUA and the other public systems. PASNY is in agreement with staff that yardstick competition "is not a criterion nor does it create criteria." PASNY R.B. at 30. However, PASNY does submit that such a measure has a bearing on the eligibility of a public body to receive preference power. PASNY I.B. at 33. To this extent PASNY focuses primarily upon rate comparisons and refutes MEUA's concept of displacement. On brief PASNY said:

> displacement does not represent mainstream economic thinking with respect to the meaning of yardstick, which is nothing more than a mechanism by which the rates and/or quality of service of differently owned entities can be compared. In fact, displacement really represents the *failure* of the yardstick comparison and the resulting pressure to bring about a reduction in rates or an improvement in the quality of service.

PASNY R.B. at 29.

The criteria set forth by VDPS are based largely on its interpretation of Opinion Nos. 229 and 229-A and their subsequent affirmation by the Second Circuit Court of Appeals, *MTA v. FERC*. On brief VDPS interprets these decisions as follows:

> Pertinent here, the Commission found and the Court affirmed that 'Congress hoped to instill competition into an otherwise monopolistic market' 30 FERC ¶ 61,323 at 61,652 (1985) and that a 'key goal of Congress' in enacting the preference for public bodies was the promotion of yardstick competition. 32 FERC ¶ 61,194 at 61,450 n. 6 (1985); *MTA v. FERC, supra,* 796 F.2d at 591. At issue in Opinion Nos. 229 and 229-A was whether the Metropolitan Transportation Authority (MTA) and the Vermont Department of Public Service (as then constituted) were the types of public bodies that would, in fact, provide yardstick competition to private utilities. *MTA v. FERC, supra,* 796 F.2d at 592.

VDPS I.B. at 62.

Hence, the first criterion proposed by VDPS is that a public body must provide yardstick competition at retail. VDPS reasons that:

> Since only distributors, and not wholesalers or end users, can accomplish this, 30 FERC at 61,651, evidence that

> the public entity is, in fact, a retail yardstick competitor would indicate that it is 'selling and distributing power directly to consumers of electricity at retail.' 30 FERC at 61,651.

Id. at 64.

The second criterion listed by VDPS is that a public entity must be "capable" of selling and distributing power at retail. VDPS points out that by this the Commission does not imply an ownership requirement, and public bodies may rely on "generation, transmission and distribution facilities owned and controlled by other entities." *Id.* at 64-65. Citing Opinion No. 229-A, VDPS says that in order for the public entity to be "capable" of retail distribution, it must "obtain the means for taking and delivering power." 32 FERC at 61,451 n. 7 (quoting 41 Op. Atty. Gen. 236, 244 (1955)). VDPS contends that the means for taking power are usually wheeling arrangements. The means for delivery of power "similarly suggests that contractual arrangements for delivery equally as well as the more common ownership and operation of distribution facilities, satisfies the Commission's 'capability' criterion." VDPS I.B. at 65. The third criterion derived from Opinion No. 229-A by VDPS is that the distribution of power at retail must be the direct responsibility of the public agency. VDPS equates direct responsibility to the consumer with accountability to the Vermont Public Service Board. *See* Footnote *Id.* at 65.

VDPS asserts that the criteria set up by MEUA and other public systems do not withstand analysis. No party disputes that the ultimate purpose of yardstick competition is to promote lower retail rates for all consumers. However, VDPS refutes the contention made by Public Systems' witness Taylor that yardstick competition doesn't include rate comparisons. VDPS says that "there is nothing in either the legislative history of the NRA, the two Second Circuit Court of Appeals decisions (*PASNY* and *MTA*) or the Commission's Opinion Nos. 229 and 229-A to suggest that yardstick competition under the NRA is to be given other than its normal meaning." VDPS I.B. at 67-68. VDPS refutes Public Systems' criteria requiring responsibility to meet load growth requirements to its customers, on the same grounds.

VDPS also attacks Dr. Taylor's "control" and "full requirements" criteria as not being necessary to promote yardstick competition or distribution at retail. *Id.* at 71. To this extent VDPS says:

> The purpose of the Act is served not by operational control over distribution facilities, but by the example of public bodies with some 'local control over *decisions* involving price, availability of power, and methods of generation.' Opinion No. 151, 22 FERC ¶ 61,021 at 61,121 (1982). Clearly, if the public body has use of the distribution system to deliver *its* power to customers at a price it determines, as does VDPS, the public body has the decisional control to substitute *its* sources of generation and *its* prices for that of the private utility.

Id. at 72-74. In addition VDPS states:

> Similarly, there is nothing in the nature of wholesale *or* retail competition that remotely suggests an entity must supply the full requirements of its customers in order to provide competition to others. There are several examples in the record of electric consumers that purchase only part of their requirements from the local utility with the remainder supplied by self-generation (Laber, V-3, pp. 24-25) or a third party.

Id. at 74.

While VDPS does not dispute Public Systems' criterion requiring distinguishable service, it does reject the "indicia" of such service suggested by Public Systems, *e.g.*, separate meter readers, as serving no purpose. *Id.* at 76.

Finally, VDPS finds a sham, the criteria of Public Systems for public body status of systems leasing distribution facilities. VDPS argues that the criteria requiring (1) complete control over distribution facilities, (2) complete displacement of the private utility, and (3) ousting the private utility of the right to serve customers, are "discriminatory and indefensible." *Id.* at 78.

Commission Staff has prescribed three criteria necessary for public body status. The first criterion requires a public body to be authorized under state law to be in the public utility business and, more specifically, to distribute power. That this is necessary of a public body preference power recipient is not disputed.

The second criterion set forth by Staff is that a public body must be directly responsible to retail customers for the electric energy sold and delivered to them. Staff I.B. at 7. Staff defines "directly" as "independent action without sharing of authority." Ex. S-1 at 5. Staff is essentially in agreement with MEUA with regard to this requirement. Elaborating on the meaning of direct responsibility Staff said:

> In order for a public body to be directly responsible, it must be the decision-maker in determining how all of the requirements of its customers are met. There is no sharing of authority or responsibility with non-qualifying entities.
>
> Having this responsibility includes having control over the present and future resources required to meet the customer's needs. . . . This means that the public body controls the existing distribution facilities and the additional distribution facilities required to meet load growth:

Staff I.B. at 7-8.

The third criterion discussed by Staff is that a public body must have control over the distribution system. Again Staff is in agreement with MEUA and the other public systems on the extent of "control" necessary. Staff adopts the definition of control as "the authority to manage a system without constraint." *Id.* at 11. Staff is careful to note that this level of control is similar to the control an owner of a distribution system would have. Staff recognizes that ownership is not a criterion. Staff says that "[a]nything less than ownership or control would result in indirect distribution, and indirect distribution is impermissible under the NRA." *Id.* Staff also contends that "control" includes authority over "present and future resources required to meet the needs of retail customers being served." *Id.* Finally, Staff interprets the level of control as including "the ability to provide alternative energy sources, to lower price, and to employ other cost-cutting measures in distribution that will in turn lower the rates to the customer." *Id.* at 12.

Staff does not believe that the ability to provide yardstick competition is a characteristic of an NRA public body. Staff incorporates the testimony of Ms. Whitefield that the benefits of competition are the goal of the preference provision of the NRA, not a qualification. Ex. S-1 at 10. Staff states:

> The requirement is that the NRA public body have responsibility and control. That public bodies with this responsibility and control provide yardstick competition is a desired effect and benefit. Ex. S-1 at 10. It is not a criterion. *Id.*

Staff I.B. at 47.

Ruling

An NRA body must be authorized under state law to be in the electric utility business. The MDAs and VDPS are so authorized. Now, we must establish the other essential characteristics and responsibilities of an NRA public body. Then the actual operations of the respondents must be examined to ascertain if they have these characteristics and responsibilities.

The FERC opinions and Court of Appeals decisions discussed by the participants have dealt with which entities are entitled to receive preference power. The legislative intent has received a thorough examination by FERC and the courts leaving not much more to be said.

Thus, the Court of Appeals in *MTA v. FERC,* made a number of pertinent rulings which govern this proceeding. With respect to public bodies, the Court said:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislature history of the NRA demonstrates that that is what Congress intended the term to mean.

796 F.2d at 591.

> We therefore affirm FERC's conclusion that the term "public bodies" in 16 U.S.C. § 836(b)(1) means "publicly-owned entities that are capable of selling and

> distributing power directly to consumers of electricity at retail."

Id. at 593.

This principle, being so clearly enunciated by the Court requires no additional comment. The Court also found that VDPS, as constituted before the passage of Section 216(a) by the Vermont legislature, was not an NRA public body.

One other principle is also clearly established. Ownership of a distribution system is not a requirement. In Opinion No. 229-A, the Commission corrected an earlier misstatement and left for later decision as to whether or not VDPS qualifies as a public body. The Commission stated:

> Opinion No. 229 inadvertently stated that VDPS was not a "public body" because it does not own a distribution system. Slip op. at 14. Since an ownership requirement has not been Commission policy in the past, *see, e.g., Town of Massena v. Niagara Mohawk Power Corp.*, 13 FERC ¶ 63,036 (1980), *complaint withdrawn and decision vacated as moot,* 20 FERC ¶ 61,406 (1982), and we did not intend to create a new prerequisite in Opinion No. 229, we are hereby correcting Opinion No. 229 in this respect. In all other respects, however, we stand by the definition of "public body" set out in Opinion No. 229. On the present record, we cannot determine whether the Vermont legislature's recent actions, 30 V.S.A. § 212a, on April 23, 1985, will enable VDPS to qualify as a "public body" under the NRA. We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

32 FERC at 61,451, n. 12.

With the disposition of these basic propositions, the determination of the essential characteristics and responsibilities of a public body rests upon the capability of "selling and distributing power directly to consumers of electricity at retail."

In order to achieve this capability, the operations of a candidate for public body status must have certain attributes. As can be seen from the prior discussion of their positions, a difference of opinion exists between the complainants (including supporting intervenors) on the one hand, and, on the other, the respondents (including supporting intervenors). The standards set out by the complainants and Staff, insofar as they are adopted below, prevail.

1. *An NRA public body must provide yardstick competition.*

Whether yardstick competition is, as urged by Staff and PASNY, a goal or a criterion, as advanced by the other parties, is a distinction without a difference. In either event, to achieve public body status, an entity must provide yardstick competition. It has been clearly recognized that this is the intention of Congress. In *MTA v. FERC*, the Court rejected an MTA argument to the contrary stating:

> In view of Congress' crystal clear intent to adopt the NRA's preference provision in order to create yardstick competition, that argument must be rejected.

796 F.2d at 593. It is therefore beyond dispute that a public body must be capable of fostering yardstick competition.

However, an NRA public body need not be in a head to head competition with privately owned utilities for individual customers in order to perform a yardstick competition function. Although not a requirement, yardstick competition, in its ultimate form, exists if the public body competes directly with investor-owned utilities in selling power to the ultimate consumer. After this fundamental determination, the inquiry must turn to what are the necessary elements of yardstick competition. Yardstick competition provides a benchmark against which the performance of privately owned utilities can be compared with respect to rate, price and quality of service by consumers and regulators. Yardstick competition requires that the public body be a model of an alternative method of electric power supply for communities which are dissatisfied with the rates or service of the investor owned utilities now serving them. Yardstick competition involves a threat of takeover or displacement to the investor owned utilities. Underlying the concept of yardstick competition there must be a meaningful opportunity for consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities. While a public body need not supply all of the power requirements of a customer it does have to substantially meet the energy needs of its customers.

2. *An NRA public body must be directly responsible to retail consumers for the electric energy sold and delivered to them.*

The Commission has ruled that ownership of a distribution system is not necessary for a public body. However, the public body must do more than merely arrange for distribution. In a prior proceeding, the Commission ruled out an arrangement for distribution service via a wholesale transaction, saying:

> Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party *directly responsible* for the needs of the consumers served. *Id.* at 14. Accordingly, we found that neither was entitled in its own right to purchase preference power under the NRA, ...

32 FERC at 61,444 (footnote omitted; emphasis supplied).

Black's Law Dictionary, 5th Edition, 1979, at 414 defines "directly" as follows:

> In a direct way without anything intervening; not by secondary, but by direct means.

Staff uses a similar definition from *Webster's Third New International Dictionary*, unabridged:

> *directly* — in independent action without sharing of authority or responsibility; and without any intervening agency or instrumentality or determining influence.

Ex. S-1 at 5.

If the Commission's use of the term directly responsible needs further amplification, the cited definitions do so. To be directly responsible, a public body must be the decision maker in determining how the requirements of its customers are met. The responsibility must be to the retail consumer of electricity. Responsibility is shown when consumer complaints concerning rates or service are directed to the public body, which must have the ability to take corrective action.

As Staff so aptly remarks, "when a customer turns on the light switch, the public body is responsible for seeing that the light goes on now and in the future . . . ." Staff I.B. at 8. Further as the Webster definition shows there can be no sharing of this responsibility.

3. *An NRA public body must have control over the distribution system.*

Staff again cites *Webster's Third New International Dictionary,* unabridged:

> *control* - exercise restraining or directing influence over: regulate, curb; and power or authority to guide or manage.

Black's Law Dictionary, Revised Fourth Edition at 399, has a similar definition:

> Control, v. To exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern. Owen v. Trail, 302 Mo. 292, 258 S.W. 699, 702; Hopkins v. Howards Ex'x, 266 Ky. 685, 99 S. W. 2d 810, 812.
>
> To Control a thing is to have the right to exercise a directing or governing influence over it. Trust Co. of New Jersey v. Greenwood Cemetery, 21 N. J. Misc. 169, 32 A.2d 519, 523.

These definitions aptly fit the power of an owner. However, the same authority can be conferred upon a leasee by an appropriate lease. Control must be more than being a conduit for distribution of power. The Commission commented in Opinion No. 229-A:

> The House Report, H.R. Rep. No. 2955, 74th Cong., 2d Sess. 3 (1937) makes clear that the Act permits sales of preference power "to States and political subdivisions of States . . . but for the major and primary purpose of

> supplying electrical energy to their members as nearly as possible at actual cost." Thus, we believe Congress contemplated that preference customers would be retail distributors, not end-users or conduits for the transfer of preference power to investor-owned utilities. *Accord*, Fereday, "The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes," 9 Envtl. L. 602, 631-32 (1979).

32 FERC at 61,451 n. 7.

Control of a distribution system must be the authority to manage a system without restraint. Without this authority, an entity does not satisfy a Commission requirement set forth in Opinion No. 229:

> The Committee which reached the compromise that was enacted as the NRA used the terms 'public bodies' and 'public distribution systems' in two adjacent and related paragraphs which discuss the compromise between federal preference advocates and New York State interests. H. Rep. No. 862, reprinted in 1957 U.S. Code Cong. & Ad. News 1585, 1593. Indeed, the statute itself uses the terms 'sale and distribution' in the precatory language. 16 U.S.C. § 836(b)(1). Under these circumstances, we conclude that only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA. *See PASNY*, 743 F.2d at 103, where the Second Circuit uses the term 'municipal utilities' for public bodies.

30 FERC at 61,651.

Public Systems' witness, Dr. Taylor, found that:

> To be capable of 'distributing power directly' means to have control of the distribution system so as not to have to rely on, or be constrained by, anyone else, and to have a direct seller-customer relationship with each customer.

Ex. PS-1 at 28.

The authority to fix rates and conditions of service must include the power to employ cost cutting measures in distribution as well as the ability to ensure the continuity of service. Only if an entity has all of these attributes does it satisfy this criterion.

B. *Qualifications of the MDAs as Public Bodies*

Fifty-two MDAs have been allocated power by PASNY. Of these, six are actually receiving preference power because PASNY has decided that they are "capable" of providing for the distribution of preference power at retail. PASNY I.B. at 36. PASNY asserts that the MDAs are public agencies which were formed pursuant to state and local law. The six MDAs have executed contracts with PASNY and are receiving an allocation of preference power.

Position of the Parties

PASNY has determined that the MDAs have the attributes of a public body. They have the responsibility to distribute power to their retail customers. To effect the distribution of this preference power the MDAs engage in the following functions:

1. Develop their own rates and prepare rate filings with PASNY;
2. Ensure that savings realized from the sale of preference power are passed on to the consumer;
3. Make payment to PASNY for charges for electricity;
4. Establish terms and conditions of service, including customer billings, security deposits, payment of bills and discontinuance of service.

Delivery of power is accomplished by the MDAs through the physical facilities of the private utilities by lease or contract. For example, COWPUSA and NYCPUS provide for distribution of preference power through lease agreements with the Consolidated Edison Company of New York, Inc. (Con Edison). Under their lease agreements COWPUSA and NYCPUS pay Con Edison for the use of Con Edison's distribution system as well as for other services such as billing and collection from retail customers. PASNY I.B. at 40-41. PASNY finds that the MDA methodology complies with the requirements of law.

PASNY asserts that the MDAs are prohibited by contract from selling any preference power other than pursuant to law. PASNY contends that the MDAs are not wholesale brokers of power, which has been found objectionable in Opinion Nos. 229 and 229-A. The fact that the MDAs lease rather than own their distribution facilities does not affect their capability of delivering power at retail. Nor are the MDAs end users of power.

PASNY asserts that the propriety of the MDAs formation and the authority's allocation to the MDAs under New York law are not in issue in this proceeding, *MEUA & CMEEC v. Power Authority,* 35 FERC ¶ 61,333 at 61,759 n. 7 (1986). PASNY I.B. at 38.

It is argued that the lease and operating agreements (LOAs) between Con Edison and each of the MDAs are sufficient to give the latter the unfettered right to deliver the preference power purchased from PASNY. It is not significant that the MDAs method of operating differs from that of MEUA members, according to PASNY.

PASNY believes that COWPUSA and NYCPUS foster yardstick competition which allow comparison with the rates of the private utilities. PASNY says that while neither the rates of Con Edison nor the MDA appears on the bill, the consumer is aware of the amount of the savings which result from the MDAs preference power. Thus, a customer of Con Edison and NYCPUS has the basis from which to attempt a rate comparison. PASNY argues that the mere existence of an MDA, as shown on a Con Edison bill, informs the customer that preference power is available from the MDA and that it has saved him money. Without the presence of an MDA, it is unlikely that a rate comparison would be made. In addition, PASNY asserts that MDAs are able to compete with each other and with private utilities for industrial customers.

Con Edison, on brief, points out that the testimony of its witness, Dr. Bower, focuses on the real purpose of public power, increased efficiency. Thus he says:

> A 'public body' that chooses to own when it can gain control at lower cost through contract is a poor rival for private firms . . . Control, not ownership, is the key to independent action. Securing control at the lowest cost is essential if a 'public body' is to act effectively.

Ex. NYC/COW-1 at 18.

Con Edison also argues that the principle of yardstick competition is implicit in the definition of a public body. Con Edison is required to show on its bill to the consumer the amount of money that NYCPUS and COWPUSA has saved it.

Con Edison states that there is competition between it and the MDAs but that the additional business attracted because of the lower costs of preference power outweighs the detriment of the added competition.

COWPUSA was organized pursuant to the authority contained in Section 360 et seq. of the New York General Municipal Law which provides:

> Notwithstanding any general or special law, any municipal corporation *may construct, lease, purchase, own, acquire, use and/or operate any public utility service within or without its territorial limits*, for the purpose of furnishing to itself or for compensation to its inhabitants, any service similar to that furnished by any public utility company specified in article four of the public service law. For such purpose, *any municipal corporation may purchase gas or electrical energy from the state, or from any state agency, or other municipal corporation, or from any private or public corporation.* (Emphasis added). General Municipal Law, § 360(2).

COWPUSA I.B. at 4.

Westchester County was seeking a way to lower the rates of electricity for the citizens. With the passage of legislation, the county had several options available to qualify for PASNY power. On the recommendation of its Committee on Legislation, the County Board opted for the formation of a MDA. This action was selected because of the following factors:

(1) A projected cost of a billion dollars for the takeover of Con Edison's facilities in the county;

(2) the likelihood of substantial litigation costs associated with a takeover;

(3) the limited availability of preference power; and

(4) the conclusions of a study that indicated that the costs of a bond issue to finance a takeover would negate any savings.

Id. at 5.

To accomplish distribution of PASNY power COWPUSA entered into a Lease and Operating Agreement with Con Edison on February 28, 1985. The LOA provides that Con Edison leases its facilities to COWPUSA for the distribution of an unrestricted quantity of preference hydropower and energy to COWPUSA's designated retail customers. Con Edison provides transmission, delivery, billing and collection services. *Id.* at 7. COWPUSA's payment under the LOA, represents the charges that would have been billed to ratepayers under Con Edison's applicable tariffs, less Con Edison's fuel and purchased power costs, subject to reopener if Con Edison determines that it requires additional generating capacity. *Id.* Ex. COW-10, Para. 6. Under the LOA, COWPUSA also determines the classifications of its customers which to date have been residential.

Customers bills rendered by Con Edison reflect the charges for all service provided in a billing period both from Con Edison and COWPUSA. The bills identify COWPUSA as the supplier of hydroelectricity purchased from PASNY. The bills do not show the individual rates of COWPUSA but indicate a monetary credit from the sale of the preference power. Although not separately identified, the COWPUSA rates are roughly $2\frac{1}{2}$ cents per kilowatt hour lower than Con Edison's rate and are based on COWPUSA's actual costs to purchase, transmit, distribute and deliver power and energy to its customers, together with administrative expenses and other charges COWPUSA incurs or has an obligation to pay.

COWPUSA asserts that since service was begun on July 1, 1985, it has delivered to its 270,000 residential customers through its arrangements with Con Edison between 3.7% and 10.8% of their monthly electrical requirements. Con Edison supplies the balance. COWPUSA I.B. at 23.

This MDA states that its operations affect the pricing and other practices of private utilities and thus furnishes the competitive pressure envisaged by the NRA. COWPUSA says:

> it promotes precisely the type of competitive pressure envisioned by the NRA - facilitating comparative analysis or by-example rivalry, directly competing with Con Edison and other utilities for all or part of a customer's business, and, through right of resort to the electoral process and exercise of eminent domain, creating the threat of ultimate total displacement of private distribution in its jurisdictional area.

Id. at 25.

NYCPUS was established for the same reasons as was COWPUSA. The New York City Council, concerned over the exodus of industry from the City, established the Public Utility Review Board (PURB) to study the high cost of electricity. PURB ordered a study to recommend improvements or alternatives to the Con Edison system. The study showed, as in the case of COWPUSA, that a takeover of the Con Edison system would be neither economical nor efficient. Such a takeover would cost approximately $10 billion.

Pursuant to section 360 of the New York General Municipal Law, authority to operate a public utility was established by Chapter 73 of the Administrative Code of the City of New York which provides:

> *Authorization for public utility service.* Pursuant to article fourteen-A of the general municipal law, the city hereby establishes a public utility service, as such term is defined in section three hundred sixty of such article, which is authorized to establish, construct, lease, purchase, own, acquire, use and/or operate facilities within or without

> the territorial limits of the city, for the purpose of furnishing to itself or for compensation to its inhabitants any service similar to that furnished by any public utility company specified in article four of the public service law. For such purpose the city may purchase electrical and other forms of energy from the state, or from any state, or from any state agency, or other municipal corporation, or from any private or public corporation, and may sell or distribute such power to itself and to residential, commercial, industrial and other customers. The city shall possess any and all powers granted to a public utility service pursuant to article fourteen-A of the general municipal law and any other applicable provision of law.
>
> * * *
>
> *Acquisition of energy and facilities.* The city shall contract for or otherwise purchase or acquire hydroelectric or other forms of energy as shall be available from the power authority of the State of New York, the state, and any State agency, any other municipal corporation, or any private or public corporation, and shall arrange to use, lease or acquire the transmission, substation and distribution facilities necessary to furnish such power to the city, and, for compensation, to residential, commercial, industrial and other customers . . .

NYCPUS I.B. at 11-12.

With this authority NYCPUS was established. NYCPUS then entered into an LOA with Con Edison which had terms similar to the COWPUSA agreement. NYCPUS determines customer classifications to whom it will sell preference power, as well as the amount of power the customers will receive and the amount they will pay for such power. Con Edison physically delivers the power to customers, bills and collects payments from the customers and remits the payments to NYCPUS. NYCPUS contends that this agreement provides a sufficient interest in Con Edison's facilities to satisfy NRA requirements.

NYCPUS sells 60% of its power to manufacturers in order to induce them to remain in the city. This amounts to 50% of their electric power needs. The balance is sold to about 2.1 million residents, which satisfies about 6% of the electricity they receive. Con Edison does not separately state NYCPUS rates on their bills but notes the amount saved because of NYCPUS power. Thus, NYCPUS argues consumers are able to distinguish the price they pay. The comparison may enable customers to pressure Con Edison or the Public Service Commission for lower rates. NYCPUS believes that it offers "by example" competition because of the above enumerated functions. It points out that the New York Public Service Commission (PSC) will be able to compare its activities and performance with Con Edison.

NYSEG finds that the MDAs qualify as public bodies. It contends that the MDA method of getting power to domestic and rural consumers satisfies the qualifications to be a public body under the NRA. The MDAs furnish yardstick competition by allowing rate comparisons and competition for customers.

Orange & Rockland Utilities Inc., (O&R) is an investor-owned utility. It operates for the Orange County MDA and Rockland County MDA pursuant to LOAs. In this respect its operations duplicate that of Con Edison. O&R's bills contain the following legend: "Under an agreement between the New York Power Authority and your county's Municipal Distribution Agency (MDA), upstate hydroelectric power is being purchased by the MDA for delivery through O&R to residential customers. Your bills will reflect the savings resulting from these purchases." Its position is parallel to that of the MDA supporters discussed above.

Rochester Gas & Electric Company, (RG&E) agree with the other supporters of the MDAs. RG&E finds that the MDAs qualify as NRA public bodies because they are publicly owned entities capable of selling and distributing power directly at retail to consumers and are properly formed under applicable state law.

UPUSA members have not as yet completed negotiations for delivery of preference power through investor-owned utilities. It argues that the MDAs are public bodies for the same reasons advanced by the other supporters of the MDAs.

MEUA, CMEEC/MMWEC, City of Cleveland, Public Power Association of New Jersey (collectively Public Systems), Allegheny Electric Coop, and *Staff* do not believe that the MDAs qualify as NRA public bodies.

CMEEC/MMWEC observes that the MDAs have opted not to create publicly owned electric utility distribution systems. Instead, they have arranged in cooperation with investor-owned utilities to establish inexpensive conduits to channel preference power to the customers of those utilities. CMEEC/MMWEC argues that the MDAs do not control their distribution systems. CMEEC/MMWEC notes that NYCPUS and COWPUSA have minimal space and few employees to serve 2.1 million and 270,000 customers, respectively. Nor do the MDAs, CMEEC/MMWEC contends, distribute power directly to consumers.

CMEEC/MMWEC also claims that the MDAs do not offer yardstick competition. While Con Edison's customers may benefit from the lower preference power costs, CMEEC/MMWEC argues, they lose the benefit of Con Edison responding to a real competitive threat.

Staff analyzes the MDAs which are currently receiving preference power and finds that they do not qualify as NRA public bodies. The agreement with Con Edison grants NYCPUS a lease of an undivided interest in the utility's distribution system. As noted earlier, over two million residential customers receive 40% of the preference power and certain industrial customers receive 60%. The residential customers obtain a 1% savings on their utility bills. Preference power fills about 6% of the load of the residential customers, the balance is furnished by Con Edison. The utility has the franchise responsibility for 100% of the load and it furnishes all of the other services it normally provides for its customers. Staff believes that, in fact, all these consumers are really customers of Con Edison. NYCPUS, Staff finds, is in the bulk power business. It turns over the preference power it receives to Con Edison for resale to individual customers. Staff notes that Opinion No. 229-A, 32 FERC at 61,444 has ruled that the customers of investor-owned utilities are not to receive preference power. Staff agrees with the complainants that NYC-

PUS is not directly responsible to retail customers for the electric power sold to them nor does it have control over the distribution system. Con Edison has not given up control of its distribution system or its responsibility for meeting the needs of its retail customers. Thus, when PASNY has an outage either PASNY or Con Edison fulfills the customer's needs for service. Con Edison takes care of interruptions in service, hook-ups, initiating service, or complaints. Staff stresses that the LOA states that Con Edison has exclusive control of the distribution system. The only control that NYCPUS has is the selection of the class of customer to receive preference power. The LOA provides that if the total costs to the consumer are higher than Con Edison's then Con Edison has the right to suspend the agreement.

Staff also points out that NYCPUS has no control over the present or future resources needed to meet the needs of retail customers and has no obligation to supply such needs. Staff refutes as irrelevant the argument that NYCPUS has the same control over distribution as the MEUA members have over generation and transmission. It is the sale and distribution of power to consumers at retail that controls the qualification of a public body. Staff argues that NYCPUS has no more control over rates than an individual customer. The NYCPUS rate is composed of the rental payment to Con Edison which is based upon Con Edison's total costs minus the purchased power and full costs. The rate also includes NYCPUS' cost of administrative payments to PASNY and payments for transmission.

The LOA permits Con Edison to terminate the agreement if condemnation proceedings are instituted, or if arrangements would cause an increase in Con Edison's rates or a reduction in net income available to Con Edison's stockholders.

Staff makes basically the same comments about COWPUSA. The agreements between Orange County and O&R, Orange County and New York State Electric & Gas Company, Rockland County and O&R, Nassau County and Long Island Lighting Company (LILCO), and Suffolk County and LILCO are similar to the LOAs discussed above.

The arguments made by the participants on reply briefs, as well as on initial briefs have received careful consideration whether or not specifically referenced. Where appropriate certain rebuttal arguments are commented upon in the ruling made below.

Ruling

That the MDAs are authorized to conduct utility functions by appropriate state law has already been established. The issue here is whether under this authority they actually have operated in a manner sufficient to qualify them as NRA public bodies.

Preliminary Matter

NYCPUS and others have cited an order of the New York State Public Service Commission in support of the proposition that MDAs qualify as public bodies. Thus, NYCPUS on brief, notes

> While neither this Commission nor any Court has yet addressed NYCPUS' status as a "public body", the New York Public Service Commission (the "PSC") has explicitly stated that
>
> [w]e note that if we were to pass on whether the MDA's have legitimate status under the NRA and the General Municipal Law we would be inclined to rule in the affirmative.
>
> *Order Denying Petition For Rehearing* in PSC Cases 29126, 29130, 29145 and 29188, dated June 25, 1986, at page 3.

NYCPUS I.B. at 45.

Obviously, the statement in the Public Service Commission order is dictum. The State Commission does not and, of course, cannot assert jurisdiction over the subject matter of this proceeding. While this comment is received with interest, it cannot influence the determination whether or not the MDA's qualify as public bodies.

Do The MDA's Qualify As NRA Public Bodies?

The essential characteristics and responsibilities of an NRA public body have been established in Issue A. The issue now is, how do the MDAs measure up to the standards of an NRA public body. NYCPUS and COWPUSA, in their reply briefs argue that the standards have been misapplied, or as applied that the standards are irrelevant, or that the LOA agreements have been misunderstood. I find that Staff and the complainants have correctly defined and applied the standards to the operations of the MDAs. All the LOAs have virtually identical terms. For convenience of reference the NYCPUS-Con Edison LOA is used as an example but the discussion applies equally to all of the MDAs. The LOAs are evidently meant to clothe the MDAs with the indicia of an NRA public body. However, there are a number of provisions in the agreements that negate this purpose. Thus, we see a clause that provides that the franchise responsibility remains with Con Edison to supply the full requirements of its customers for electric service. This responsibility existed before the creation of the MDAs and remains unchanged. There is no responsibility left for the MDAs to assume which belies the claim that there is a dual customer relationship. The reality is that the preference power is delivered exclusively to customers of the investor-owned utility.

Another clause provides that "Con Edison shall remain responsible to the City's consumers for continuity of electric service to the same extent (but to no greater extent) as in the absence of these arrangements," NYCPUS R.B. at 46 quoting paragraph 21 of the LOA. Despite NYCPUS' disclaimer, it is apparent that the control over quality of service remains with Con Edison. There is no responsibility left for NYCPUS to assume.

Paragraph 3 of the LOA, which is cited by Staff and NYCPUS, provides that Con Edison shall have exclusive control of its entire system. NYCPUS' argument that it does not need physical control because Con Edison is its operating agent is not convincing. Exclusive control in Con Edison leaves no room for assertion by NYCPUS of any significant control. A position which is inconsistent with the concept of a public body.

The comparison between the level of control exercised by MEUA and CMEEC over generation and NYCPUS' control over distribution is irrelevant. There is no challenge to the complainants' control over distribution facilities. An NRA public body must control distribution. The NYCPUS argument to the contrary is unavailing. The standard is control over distribution not generation.

Several other provisions of the LOA give Con Edison the right to suspend or terminate the agreement under certain circumstances:

(1) If the proposed arrangements result in higher energy costs for the City's consumers. ¶ 17, LOA, Ex. PS-77 at 21; (right to suspend)

(2) If implementation of the agreement would result in an increase in Con Edison's rates to its customers above what they would have been in absence of the arrangement, ¶ 25, LOA, Ex. PS-77 at 25; (right to terminate)

(3) If implementation of the agreement results in a reduction in net income available for Con Edison's common stockholders below what it would have been in the absence of these arrangements. *Id.* (right to terminate)

It is particularly significant that paragraph 18 of the LOA reserves in Con Edison the right to terminate the agreement in the event that the City shall institute condemnation proceedings against Con Edison or any of its facilities for the purpose of distributing electricity to the City's consumers. Ex. PS-77 at 22. All of these provisions negate the asserted NYCPUS independence of action and the ability to provide yardstick competition.

The bills of Con Edison or the other privately owned utilities to the consumer do not show individually the rates of preference power. Instead they contain a notation that there has been a saving of a specified amount because of the preference power. Thus, while the MDAs purport to provide yardstick competition, the reality is that they do not. Perhaps the crowning failure is that a consumer is offered no choice. The consumer must be a customer of the privately owned utility or service is not available. Moreover, the knowledge that a savings has occurred does not give a consumer an opportunity to compare the quality of service or price.

The Court of Appeals in *MTA v. FERC*, 796 F.2d at 593 ruled as follows:

> We therefore affirm FERC's conclusion that the term "public bodies" in 16 U.S.C. § 836(b)(1) means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." MTA does not contend that it satisfies that definition and VDPS does not argue that it satisfied the definition prior to the passage of 30 Vt. Stat. Ann. § 212a, *see supra* at 13. Neither MTA nor VDPS were purchasing hydropower from PASNY for resale to customers at retail. MTA was not reselling the power at all. By reselling power to private utilities VDPS was lessening any potential competition on their part in the distribution of the power which might occur if the preference power were distributed through municipal utilities. Accordingly, we affirm FERC's conclusion that VDPS, as constituted prior to 1986, and MTA are not "public bodies" entitled to purchase preference power from PASNY. (footnotes omitted).

The operations of the MDAs do not significantly differ from the 1985 operation of VDPS prior to 1985, which operation has been found to be non-qualifying. There is no obvious distinction between the LOA and the outright purchase of preference power and resale to the utility. Substance must prevail over form - - a rose by any other name - -.

The above discussion specifies NYCPUS, but it applies as well to the other MDAs. It is the totality of the operation that denies public body status to them.

The quest for less expensive electric power by the MDAs is laudable. In seeking to retain industry and to attract new industry NYCPUS has an objective which would benefit the people of the city. However, under the provisions of the NRA the MDAs are not entitled to receive preference power. Perhaps they should be.

In rejecting an MTA argument disparaging yardstick competition, the Court stated:

> In view of Congress' crystal clear intent to adopt the NRA's preference provision in order to create yardstick competition, that argument must be rejected. Assuming *arguendo* the improbability of such competition (although we take judicial notice of the recent sharp decline in the price of oil as a source of private power) "[i]t is not for FERC or ourselves to second-guess [Congress"] basic determination. *Power Authority of the State of New York, supra,* 743 F.2d at 105. Any rectification lies exclusively with Congress. (Emphasis supplied).

Id.

Power to grant access to preference power lies with Congress — not the Presiding Administrative Law Judge.

C. *Qualifications of the VDPS As A Public Body*

Preliminary Matter

VDPS, in its Reply Brief, requests reconsideration of my earlier order issued July 9, 1987 denying its motion to reopen the record for the limited purpose of considering a newly enacted Vermont statute, Section 130. The ruling was based upon my finding that legislation enacted after the close of the record is irrelevant. Reconsideration is denied.

Does The VDPS Qualify As A Public Body?

Following the issuance of Opinion No. 229, 30 FERC ¶61,323 (1985) in which the Vermont Department of Public Service was held not to be a public body, the Vermont legislature enacted 30 V.S.A. § 212a, which provides:

> § 212a. Retail sales by department
>
> The department of public service, in addition to the powers conferred upon it by sections 211 and 212 of this title and notwithstanding any limitations on that authority imposed by those sections or by any other law of this state, is hereby

> authorized to distribute and sell at retail electrical energy purchased from the Niagara and St. Lawrence power projects directly to all rural and domestic consumers of electricity in Vermont electric utilities that include, without limitation, the leasing of facilities and the providing of services to the department to distribute such electric energy.

VDPS I.B. at 5.

VDPS, argues that the Vermont legislature, in enacting 30 V.S.A. ¶ 212a, intended to bring it within the definition of a "public body." VDPS I.B. at 80. The intent of the state legislature is not controlling. The Court in *MTA* declined to rule on the question. However, as noted earlier in this decision, VDPS does have the requisite authority. As with the MDAs, the question is, has VDPS operated in such a way as to qualify.

VDPS obtains preference and non-preference power from the Niagara and St. Lawrence projects respectively. It has entered into "Lease and Operating" and "Service" agreements (LOAs) with investor-owned utilities. These agreements are virtually identical to those used by the MDAs. Each agreement grants the Department an undivided interest in the company's distribution system to the extent necessary to distribute the power to the department's eligible customers. Each company is obligated as an independent contractor to maintain and operate those facilities. Each company agrees to meter and bill Department customers, and collect for and disburse payments to VDPS. VDPS I.B. at 80-81. VDPS asserts that these agreements reflect a cost effective and sensible approach to operate under the statute.

VDPS acknowledges that it does not and never has claimed that it physically delivers power to its retail customers. However, unlike the MDAs, VDPS plays a major role in the supply of electric energy. It claims to be the third largest wholesale supplier in the state. VDPS power is delivered to all the 228,000 rural and domestic customers in the state. About 20% of these customers have their entire needs satisfied by this power. Moreover, VDPS also contracts with other sources for the distribution of non-preference electric power. The Vermont utilities show on their bills to the customers the number of kWhs and the total charge for VDPS power. VDPS rates, as well as those of the investor-owned utilities, are on file with the Vermont Public Service Board. In addition, enclosures with the utility bills advise customers of the savings effected by preference power. Thus, VDPS argues that it supplies yardstick competition because a customer can compare its rates with those of an investor-owned utility.

Staff agrees that VDPS provides yardstick competition because rate comparison may lead to the formation of additional public bodies. Staff does not, however, believe that yardstick competition makes a public body.

Commenting on control of facilities, VDPS states:

> While the operation and maintenance of the physical facilities themselves remains under the control of the private utility (as is the case where an entity purchases generation or transmission) these operating and maintenance functions are necessary to the delivery of the Department's power and are compensated for in the agreements. PS-149, Service Contract, pp. 1-12; Koliander, V-2, p. 14.

VDPS I.B. at 7.

VDPS rates are subject to the regulation of the Vermont Public Service Board. Unlike the situation prior to July 1, 1985, VDPS asserts that it now undertakes the risks as a retail distributor of power. VDPS is subject to certain fixed charges of the transmission company that moves PASNY power from New York through Vermont. It is also responsible for PASNY demand charges. It only collects these costs if power is actually sold to consumers.

Ruling

As with the MDAs, the operations of VDPS must be compared with the standards of an NRA public body. The VDPS is authorized by statute to engage in the retail distribution of power purchased from the Niagara and St. Lawrence power projects to all rural and domestic consumers of electricity in Vermont. How this authority was utilized is what must be examined.

1. Yardstick Competition

In contrast to the MDAs, VDPS does supply a substantial percentage of Vermont's residents' needs for electricity. This is an element of yardstick competition. However, other elements are missing. For instance, the costs of operations are basically those of the utility, not those of VDPS. This eliminates the incentive to achieve operating efficiencies and cost reduction because there is no basis of comparison between the utility and the public body. For the same reason, there is no opportunity to compare quality of service.

Rate comparison also is not readily available. Although VDPS is attempting to have its rates specifically shown on electric bills, in many instances they are not. The filing of a rate with the Vermont Public Service Board is not a suitable substitute.

While VDPS will supply electricity to any resident on request, one condition exists, the resident must also be a customer of the privately owned utility. Otherwise, power is not available. Thus, there is no real competition for new customers.

VDPS comes closer to meeting the yardstick competition requirement than do the MDAs. It has demonstrated that it is a factor in the electric power industry in the state. However, this fact does not make it an NRA public body, nor does it show that VDPS fosters yardstick competition.

2. Direct Responsibility

VDPS has no direct responsibility to retail customers for the electric energy sold and delivered to them. Under their lease and operating agreements and service contracts, the utilities perform all the utility functions. For example, Exhibit PS-149 is a typical service contract. Under the provisions of their contract, the company undertakes the following functions:

1. Metering of all power delivered to the customer;
2. billing and collection;
3. remitting collections to VDPS;
4. delivery of NYPA (herein PASNY) power; and
5. all other services requested by VDPS.

Ex. PS-149 at 4-7.

As with the LOAs used by the MDAs, the direct responsibility lies with the investor-owned utilities.

3. Control

The LOAs between VDPS and the utilities include two significant sections which provide:

> *III. Control of System and Operations*
>
> As an independent contractor under this Agreement, the Company retains exclusive control of its entire utility system and its utility operations, including all matters relating to or implementing this Agreement. The Department shall have no liability in contract or tort (or otherwise) for any act or omission of the Company in the exercise of such control of its system, and the Company shall indemnify and hold the Department harmless from and against any and all liability, suits, claims, demands, actions, judgments, costs and expenses arising from any such act or omission; provided that such indemnification shall not extend to liability arising solely from the Department's own acts or omissions.
>
> *IV.* Disposal of Assets
>
> This Agreement is subject to and subordinate to all existing and future security interests in, and other contracts affecting, the Company's assets and nothing in this Agreement affects in any way such existing future security interests in the Company's assets or other contracts affecting assets nor does this Agreement create any such security interests. This Agreement is subject to all pole attachment agreements involving the Company. This Agreement shall not in any way impair the right or power of the Company to sell, transfer, exchange, or otherwise deal with or dispose of its assets, free of any right or claim of the Department.

Ex. PS-149, LOA at 5.

As in the case of the MDAs exclusive control in the delivery utility leaves no room for control by VDPS.

Conclusion

As noted, VDPS comes closer to achieving public body status than it has in earlier litigation. The major obstacle is that the *modus operandi* does not differ substantially from that previously found unacceptable by the Commission and the courts. VDPS still does not qualify as a public body.

Perhaps one further observation is in order. As with the MDAs, Vermont's efforts to obtain lower electricity rates for its citizens are certainly laudable. For a number of years the attempt to achieve this goal has been through passage of a state statute. As I have earlier suggested, an easier path may be to seek relief through Congressional legislation.

Specific Questions Raised by The Commission

D-1. *How May Governmental Entities Which Lease Distribution Facilities From Investor Owned Utilities Qualify As NRA Public Bodies?*

This question has been discussed in depth in the body of this decision. *See* Issue A 2, 3 *supra*. To summarize, a government entity must exercise control over the distribution system and must be directly responsible to the retail customers.

D-2. *Does A "Public Body" Need to Compete With Investor-Owned Utilities In Order To Perform A Yardstick Competition Function?*

There need not be head to head competition for individual customers or for a group of customers. The public body must foster yardstick competition by setting an example. A complete discussion is contained in Issue A of this decision.

D-3. *Are the Arrangements In Each Of The Lease And Operating Agreements Between The Public and Private Utilities Lawful, And Has There Been Any Attempt To Circumvent The Law Or The License For Project No. 2216?*

It has been determined in this proceeding that the lease and operating agreements did not establish eligibility to receive preference power nor did they satisfy the requirements necessary for recognition as NRA public bodies. However, there is nothing in the record to indicate that these arrangements were other than lawful.

Relief Requested

In addition to finding that the MDAs and VDPS are not public bodies, the complainants request retroactive relief to July 1, 1985. They further request that a recommendation be made to the Commission that PASNY be prohibited, in the absence of FERC prior consent, from allocating NRA preference power to an entity other than a traditional publicly owned distribution system or rural electric cooperative. CMEEC I.B. at 82-85.

Ultimate Conclusion

I find that the MDAs and VDPS are not NRA public bodies and are not entitled to receive Niagara Preference Power. I further find that the characteristics of a public body are those set forth in this decision.

The balance of the relief requested is denied. Retroactive relief is not warranted on this record. Although the allocations of preference power to the MDAs and VDPS are not being sustained, I find that PASNY acted in good faith.

Further, I decline to make the recommendation requested by complainants. The Commission now has notice of the complainants' request. It also will have this decision and the record on which it is based. The Commission may therefore take whatever action it deems to be in the public interest.

It is ordered, subject to review by the Commission on exception or on its own motion, that within 30 days of the issuance of the Final Order of the Commission in this proceeding that PASNY shall comply with the findings and conclusions of this Initial Decision.

United States of America
Federal Energy Regulatory Commission

Municipal Electric Utilities Association of New York State v. Power Authority of the State of New York; and

Connecticut Municipal Wholesale Electric Company and Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, Docket Nos. EL86-24-000 and EL86-29-000

Opinion No. 329; Opinion Affirming Initial Decision
(Issued July 28, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

Appearances

Wallace L. Duncan, J. Cathy Lichtenberg, Jeffrey C. Genzer and Warren L. Lewis on behalf of Municipal Electric Utilities Association of New York State

Robert Weinberg and Janice Lower on behalf of Allegheny Electric Cooperative, Inc.

Algird F. White, Jr., Barbara S. Brenner, and Richard A. Frankel on behalf of Bethlehem Steel Corporation, et al.

Reuben Goldberg, Channing D. Strother, June W. Wiener, and *William M. Ondrey Gruber* on behalf of The City of Cleveland, Ohio

Donald R. Allen, Alan I. Robbins, and *Sharon K. Ochs* on behalf of Colorado River Energy Distributors Association (CREDA)

Donal F. McCarthy, John D. McMahon, and *Elizabeth D. Harding,* on behalf of Consolidated Edison Company of New York, Inc.

Philip R. Ehrenkranz, Michael T. Mishkin, and *James L. Trump* on behalf of the Cleveland Electric Illuminating Company

Andrea L. McArdle, Stacey Dolgin, and *Henry J. Logan* on behalf of County of Westchester Public Utility Service Agency

David R. Straus and Scott H. Strauss on behalf of Massachusetts Municipal Wholesale Electric Company, and Connecticut Municipal Electric Energy Cooperative

Michael Sullivan, Sherry L. Powell, Wendy M. Lane, Arthur T. Cambouris, and *Barry R. Fischer* on behalf of New York Power Authority

Daniel W. Rosenblum, Robert G. Grassi, and *Michael S. Sparer* on behalf of New York City Public Utility Service

John H. Stenger and *David G. Brock* on behalf of Niagara Mohawk Power Corporation

Paul M. Donovan, Lynda J. L. Calore, and *Jean C. Godwin* on behalf of Port Authority of New York and New Jersey

Kenneth M. Jasinski on behalf of New York State Electric & Gas Corporation

Robert J. Glasser and *Victor A. Rogue* on behalf of Orange and Rockland Utilities, Inc.

Christine P. Benagh, Carl R. Steen, Richard N. George, and *John J. Diehl* on behalf of Rochester Gas and Electric Corporation

Bruce A. Tassan and *Kirk Howard Betts* on behalf of Public Power Association of New Jersey

Shawn P. Leyden, James R. Lacey, and *Hugh Mahoney* on behalf of Public Service Electric and Gas Company

Howard J. Read on behalf of Upstate Public Utility Services Association

Harvey L. Reiter, William I. Harkaway, and *Michael Marks* on behalf of Vermont Department of Public Service

Philip L. Chabot, Jr. on behalf of Philip Chabot, Ltd.

Linda Lee, John J. Bartus, and *Richard Miles* on behalf of the Federal Energy Regulatory Commission Staff

On February 18, 1986, the Municipal Electric Utilities Association of New York (MEUA) filed a complaint alleging that the Power Authority of the State of New York (PASNY) was illegally providing preference power from the Niagara Project No. 2216 to Municipal Distribution Agencies (MDAs).[1] MEUA argued that since MDAs, which are governmental entities, lease their distribution facilities from investor-owned utilities (IOUs), they are not statutory "public bodies" selling and distributing power directly to the consumer, as required by the Niagara Redevelopment Act (NRA).[2] Subsequently, the Connecticut Municipal Electric Energy Company (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC) also filed a complaint against PASNY, alleging that PASNY was illegally providing preference power from the Niagara Project to the Vermont Department of Public Service (VDPS), which has entered into lease and operating and service agreements with IOUs. The two proceedings were consolidated,[3] and in an initial decision issued on February 16, 1988,[4] an administrative law judge (ALJ) found that the MDAs and VDPS are not public bodies within the terms of the NRA, and are therefore not entitled to receive Niagara preference power. Numerous parties have filed exceptions[5] to the ALJ's decision, and briefs opposing those

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[1] MDAs are public agencies formed pursuant to state and local law which are empowered to purchase power from PASNY and from other entities, and to arrange with utility companies for the distribution of the power through use, lease, or acquisition of transmission, substation, and distribution facilities.

[2] 16 U.S.C. § 836 *et seq.*

[3] 35 FERC ¶ 61,333 (1986).

[4] 42 FERC ¶ 63,018 (1988).

[5] Bethlehem Steel Corporation, County of Westchester Public Utility Service Agency, General Motors Corporation, New York City Public Utility Service, Occidental Chemical Corporation, Olin Corporation, Orange and Rockland Utilities, Inc., Power Authority of the State of New York, Rhode Island Public Utilities, Rochester Gas and Electric

(Footnote Continued)

exceptions.[6]

As discussed below, the Commission finds that the ALJ's determination of the characteristics of a public body was correct, and that neither the MDAs nor VDPS are public bodies within the meaning of the NRA. We affirm and adopt the judge's rationale and conclusions, 42 FERC pp. 65,158 to 65,173. The issues resolved in this proceeding are also pending before the Commission in numerous other proceedings.[7]

(Footnote Continued)

Corporation, State of New York Public Service Commission, Union Carbide Corporation, Upstate Public Utility Services Association, and Vermont Department of Public Service submitted exceptions to the ALJ's findings that MDAs and VDPS are not public bodies.

Allegheny Electric Cooperative, City of Cleveland, Connecticut Municipal Electric Energy Cooperative, and Massachusetts Municipal Wholesale Electric Company agreed with the ALJ's findings, but filed exceptions concerning the ALJ's refusal to give the retrospective and prospective relief which complainants requested.

[6] Allegheny Electric Cooperative, City of Cleveland, Commission trial staff, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Municipal Electric Utilities Association, and Public Power Association of New Jersey filed briefs opposing exceptions which supported the ALJ's findings that MDAs and VDPS are not public bodies.

County of Westchester Public Utility Service Agency, New York City Public Utility Service, Orange and Rockland Utilities, Inc., Port Authority of New York and New Jersey, Power Authority of the State of New York, Rhode Island Public Utilities Commission, and Vermont Department of Public Service filed briefs opposing exceptions which supported the complainants' requests for relief.

[7] Action on the issue of eligibility of municipal distribution agencies for preference power is involved in the following proceedings currently pending before the Commission: Docket Nos.

ER85-607-000, ER85-621-000, ER85-634-000, ER85-598-001,
ER85-763-000, ER86-262-000, ER86-341-000, ER85-648-000,
ER88- 465-000, ER88-554-000, ER88-558-000, ER87-593-000,
ER88- 586-000, ER89-50-000, ER89-237-000, ER88-579-000,
ER89-366-000, ER89-488-000, ER89-502-000, ER89-271-000.

I. Preliminary Issues

A. *Late Intervention Requests*

On April 6, 1988, the Public Service Commission of the State of New York (New York PSC) filed a motion for late intervention and a brief on exceptions, and the Rhode Island Attorney General and the Rhode Island Public Utilities Commission (Rhode Island) filed a motion for leave to file a brief on exceptions.

In support of its request, the New York PSC states that it approved the lease and operating agreements between the MDAs and the IOUs, that it did so only because of the MDAs' access to low cost preference power, and therefore that it has a unique interest in the proceeding that cannot be represented by other parties. The New York PSC states that while it was aware of the initiation of the Commission's proceedings, it had pending at that time many of its own cases and investigations involving electric utilities, and did not believe that it had the resources to participate fully in the Commission's proceedings. It maintains that its participation now will not disrupt or delay the proceedings, or cause material prejudice to or additional burden on other parties.

Rhode Island first filed a motion November 2, 1986, to intervene out of time in this proceeding, and the ALJ allowed it to intervene to "monitor" the proceeding, but denied the motion in all other respects, because Rhode Island's position was adequately represented by other parties. The Rhode Island legislature then passed legislation[8] substantially identical to the Vermont statute at issue in this proceeding (Section 212a),[9] and Rhode Island filed a motion to enlarge the scope of its intervention. The ALJ denied that motion on August 7, 1987. Rhode Island now maintains that yet new circumstances warrant its expanded intervention. It states that the Vermont statute in issue in the proceeding has been superseded by a new Vermont legislation,[10] and that Vermont, which may now rely on its new statute, no longer has the same incentive to defend Section 212a. Since Section 212a served as Rhode Island's model, it seeks to defend it. Rhode Island further states that its filing of a brief on exceptions will not delay or disrupt the proceedings.

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[8] R.I.G.K. ¶ 39-1-41.

[9] 30 V.S.A. § 212a.

[10] S. 130.

MMWEC, Allegheny, and CMEEC oppose these motions. They argue that timely intervention by the New York PSC would not have required any effort or expense, that granting the late intervention would serve as an incentive for future parties to ignore FERC filing deadlines, and that allowing it to intervene on appeal when its arguments and theories have not been subject to discovery and cross-examination would prejudice existing parties. CMEEC argues that VDPS still has an interest in defending its statute, and that the Commission found it could not rule on the eligibility of an entity to purchase preference power based solely on a claim of statutory authorization.

The New York PSC and Rhode Island each have an interest in this proceeding and have shown cause for their delay in intervening. Furthermore, since the interventions are limited to argument on exceptions and do not require a reopening of the record for additional evidence, the interventions will not delay or disrupt the proceeding. For these reasons, and in the interests of comity, the motions to intervene are granted.

B. *Other Motions*

On June 9, 1989, MEUA filed a motion to reopen the record for the limited purpose of receiving into evidence an admission by a party-opponent, a letter from Mr. Peterson, representing PASNY, to Mr. Karl R. Amylon, City Manager of the City of Watertown, New York, dated February 24, 1989. The letter purportedly acknowledges that MDAs do not actually distribute and sell to ultimate consumers, a statement in conflict with PASNY's position in the proceeding. VDPS, the New York City Public Utility Service (City Service), and PASNY oppose the motion. On February 17, 1989, City Service requested that the Commission take official notice of the Public Agency Economic Development Rate filing of Consolidated Edison Company of New York, Inc., which purportedly grants City Service the right to use Consolidated Edison's distribution and transmission facilities to deliver additional quantities of economic development power generated by PASNY to eligible industrial City Service customers. Finally, on June 5, 1989, VDPS moved to lodge an order of the Vermont Public Service Board purporting to show how VDPS would function under its S. 130 legislation.

All of these motions are denied. There must be an end to litigation, and in any event, these documents either do not show what they purport to show, or are irrelevant to the issues of this proceeding. The Peterson letter apparently relates to a transmission of power to the City of Watertown, is somewhat ambiguous in its reference to the MDAs, and does not refer to VDPS at all. A showing that City Service can use Consolidated Edison's distribution and transmission facilities to deliver additional quantities of power does not show City Service to be a public body within the meaning of the NRA. The order of the Vermont Public Service Board does not show how VDPS is implementing S. 130 in relation to the nature of its leases and billing services, and the amount of control VDPS does or does not have over distribution.

II. Background

The NRA is a project-specific statute which authorized the Federal Power Commission, predecessor of the Federal Energy Regulatory Commission (Commission), to issue a license to PASNY for construction and operation of a project using all of the United States' share of water power from the Niagara River permitted to be used by international agreement. Under Section 836(b) of the statute,[11] the Commission was required to include seven specified provisions among PASNY's licensing conditions. PASNY was licensed,[12] and, in accordance with Section 836(b) of the NRA,[13] its license Articles 20 through 26 state the terms of seven NRA provisions verbatim. Section 836(b)(1) and Article 20 of PASNY's license state:[14]

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[11] 16 U.S.C. § 836(b)(1).

[12] *See Power Authority of the State of New York*, 18 FPC 344 (1957); *Power Authority of the State of New York*, 19 FPC 186 (1958).

[13] 16 U.S.C. § 836(b).

[14] 16 U.S.C. § 836(b)(1).

> In order to assure that at least 50 percentum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 percentum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers. [Emphasis added.]

Thus, in disposing of 50 percent of the "preference power" under Section 836 and Article 20, PASNY is to give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance of PASNY's Niagara Project. Under Section 836(b)(2) of the NRA[15] and Article 21 of the license, PASNY also is to make a reasonable portion of this "preference power" available to neighboring states. Such neighboring states include Ohio, Pennsylvania, Connecticut, Massachusetts, and Vermont.[16]

The Commission and the courts have made several important findings, relevant here, in interpreting the NRA: (1) the statutory term "public bodies" means publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail, not to private entities that would then resell or distribute to the ultimate consumer; (2) one of the intents of

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[15] 16 U.S.C. § 836(b)(2).

[16] 796 F.2d 584 at 594 (2d Cir. 1986).

Congress in adopting the 50 percent preference power provision was to foster "yardstick competition;" that is, it was intended that the lower competitive rates of public bodies receiving preference power would act as a "yardstick" that would force private utilities to reduce their rates, resulting in benefits to all consumers; and (3) Congress did not intend to provide preference power to the customers of investor-owned utility companies; these customers were expected to benefit indirectly from the additional competition in the market-place.[17]

III. The Essential Characteristics Of A Public Body

A. *The ALJ's Findings*

In accordance with the court and Commission precedent, the ALJ found that the essential characteristics of a public body rest upon the utility's capability of selling and distributing power directly to consumers of electricity at retail.[18] The ALJ found that to achieve this capability the operations of the utility must: (1) provide yardstick competition (which includes competition creating a threat of takeover, substantially meeting the customers' energy needs, and providing an opportunity for rate comparison); (2) be directly responsible to its retail customers for the electric energy sold and delivered to them; and (3) control the distribution system. The ALJ also stated that a public body must be a model of an alternative supplier for communities dissatisfied with the IOU serving them. The ALJ found that the MDAs and VDPS did not meet these requirements.

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[17] *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984) (PASNY), *Massachusetts Municipal Wholesale Electric Cooperative v. Power Authority of the State of New York*, 30 FERC 61,323 (1985) (Opinion No. 229), *aff'd on reh'ing*, *Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York*, 32 FERC ¶ 61,194 (1985) (Opinion No. 229-A), *aff'd*, *Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986) (MTA).

[18] Opinion No. 229, *supra* n. 17, at 61,651 (1985), *aff'd on reh'ing* in Opinion No. 229-A, *supra* n. 17, *aff'd*, MTA, *supra* n. 17.

With regard to the yardstick competition criterion, the judge concluded that the utility must: (1) compete so as to create a threat of takeover or displacement of the IOU, (2) substantially meet the energy needs of its customers, and (3) provide an opportunity for consumers to compare the rates and quality of service of the public utility with that of the IOU. He found that the MDAs did not meet any of these three requirements, and that VDPS only met one of them.[19]

With regard to the second and third criteria of direct responsibility to the retail customers and control of the distribution system, the ALJ found that the MDAs and VDPS were not directly responsible to their retail customers for the electric energy sold and delivered to them. He stated that to be directly responsible, a public body must be the decision-maker in determining how the requirements of its retail customers are met. To make such determinations, it must control the distribution system, and control must be more than being a conduit for distribution of power. It must be control without restraint, including the power to employ cost-cutting measures in distribution as well as the ability to ensure continuity of service.

The ALJ found, in accordance with Opinion No. 229-A, that direct responsibility does not require ownership of the distribution system, but held that the utility must do more than merely arrange for distribution. He found that control could be maintained through a lease so long as the utility retained sufficient control of operations under the lease. However, based on the evidence presented in this case, the ALJ found that under the terms of the leases between the MDAs and VDPS and the IOUs, the MDAs and VDPS have no direct responsibility to retail customers for electric energy sold and delivered to them, and that the private companies retain exclusive control of the entire utility system and operations.[20]

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[19] 42 FERC ¶ 63,018 at 65,163-64, 65,169-70, and 65,171-72 (1988).

B. *Arguments of the Parties on Exceptions*

The MDAs and VDPS argue that they should be considered developing, alternative, innovative public bodies, that the ALJ's criteria for public bodies do not comport with relevant case law and NRA legislative history, and that if the criteria are restated correctly, the MDAs and VDPS meet the criteria.

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[20] The ALJ found that all the MDAs' lease agreements had virtually identical terms, under which:

(1) the IOU retains the franchise responsibility to supply the full requirements of its customers for electric service;

(2) the IOU remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU;

(3) the leases provide that the IOU shall have exclusive control of its entire system; this leaves no room for assertion by the MDAs of control over distribution facilities;

(4) the lease gives the IOU the right to suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted against the IOU;

(5) the bills are issued by the IOU, and do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power. Thus, the knowledge that a savings has occurred does not give a consumer an opportunity to compare the quality of service or price; and

(6) the consumer must be a customer of the privately owned utility, or service is not available; thus, the consumer has no real choice between utilities.

Likewise, the ALJ found that VDPS does not have sufficient control of its distribution system, since the private utilities perform all the utility functions, and as independent contractors retain, under their agreements, exclusive control of their entire utility systems and operations. Furthermore, under the agreements, VDPS has no liability in contract or tort for any act or omission of the IOU in the exercise of such control of its system.

1. Arguments on whether the MDAs are alternative public bodies.

The MDAs argue that takeovers are viable only in very small communities which are certain of supplying the full requirements of their customers. They argue that the MDAs' arrangements with IOUs should be treated as a first step in the development of alternative NRA public bodies which will provide an innovative and effective form of public competition for communities in which complete takeover and the supply of customers' full requirements are not possible.

Rochester Gas and Electric Corporation (Rochester), and the New York PSC state that MEUA members serve only about two percent of New York State's residential population, while the MDAs were created in areas representing 96 percent of the State's population. Rochester argues that MDAs therefore ensure widespread distribution of preference power, an NRA goal, much more effectively than can MEUA-type agencies. The New York PSC adds that the ALJ's decision would sacrifice the State's efforts to reallocate the power equitably.

Orange and Rockland Utilities, Inc. (Orange and Rockland) suggests that interpreting the NRA to permit only one sort of public body amounts of protectionism in favor of municipal electric utility departments, and is inconsistent with the legislative history of the NRA, which shows a Congressional intent to encourage pluralism. It also maintains that the relevant court and Commission decisions recognize a Congressional intent to foster yardstick competition, not to protect particular yardstick competitors, and that Congress did not intend to limit the class of recipients of preference power exclusively to the traditional municipal electric department.

Rhode Island argues that states traditionally have been regarded as the recipients of federal preference, that the two bills considered by Congress (presumably S.512, known as the Clark bill, and S.1037, known as the Ives-Javits bill) both contained provisions requiring allocations and sales to states, and therefore, that the compromise adopted in the NRA could not have been intended to reduce the States' role as relates to allocation of preference power.

Staff responds that the size of a community has no bearing on whether it can become a public body, that the means of obtaining the goal are paramount in determining public body status, and that if it is more difficult for the MDAs to meet the criteria for becoming a public body than it was for the MEUA members, that does not make the criteria any less applicable.

MEUA argues that if Congress had wished simply to distribute power in the widest possible manner, it would have adopted the Ives-Becker bill, allowing the sale of preference power to every consumer on a per capita basis, whether served by municipally owned utility, rural electric cooperative, or IOU. Since in Section 836(b)(1) the precatory phrase "widest possible use" precedes the mandatory phrase, "economic transmission distance," MEUA suggests that this language only expressed Congress' intent to send the power to all public bodies and cooperatives within economic transmission distance rather than to allow monopolization of the power at the project site.

2. Arguments on Yardstick Competition.

The MDAs, the New York PSC, and VDPS argue that (1) the ALJ's criteria are not mandated by the precedent, (2) his criteria for yardstick competition are too restrictive, because there are several forms of competition besides the threat of displacement that can function as a yardstick, and (3) his criteria are not practical indicia of yardstick competition.

The MDAs and VDPS argue that in *PASNY*[21] and *MTA*[22] the notion of yardstick competition boiled down to a hope or belief that the sale of preference power by public bodies to ultimate consumers would force private utilities to lower their rates,[23] but did not require any of the ALJ's three yardstick criteria. They maintain that public and private competition for bulk power sources, by-example competition through reference to rates filed with regulatory bodies, and franchise competition can serve as devices for making comparisons and therefore as yardsticks.

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[21] *Supra* n. 17, 743 F.2d at 105.

[22] *Supra* n. 17.

[23] 796 F.2d at 592.

The MDAs and VDPS also argue that the criteria are not practical indicia of the proper allocation of preference power. PASNY argues that displacement of the IOU represents the failure of yardstick competition to pressure the private utility to reduce rates or improve quality, and that if displacement occurs, the remaining consumers of the private utilities will incur higher rates, since there will be a reduced base over which to spread costs.

City Service argues that MDAs may be particularly effective yardstick competitors precisely because they can seek out segments of their rivals' business, rather than battle for it all. It suggests that the appropriate responsibility of the public body is to fulfill the commitments for power supply it has made to its customers, not necessarily all of its customers' needs.

PASNY and Bethlehem Steel Corporation[24] argue that the existence of a new entity (the MDA) on the IOU's bill provides an incentive to compare rates, and therefore expands the customer's ability to make rate comparisons. PASNY argues that, without the MDAs, customers served only by a private utility could not know what preference power costs or who is receiving it.

In addition, Upstate Public Utilities Service Association (Upstate) argues that there is no evidence that allocation of preference power to any public body, traditional or non-traditional, has ever, or will ever, result in lower distribution costs, create pressure for public takeover, or cause IOUs to alter their requests for higher rates. It adds that there is no evidence that consumers look at the distribution cost component of their bills, or even know, let alone compare, the distribution costs of their local utility with those of the traditional public bodies. Upstate maintains that displacement of an IOU will increase distribution costs. It also states that, unlike MEUA-type entities which simply use all of the preference power available for their needs, MDAs use such power to compete in the bulk power market. It states that preference power, used thus as seed money, will unleash new competitive forces and create new yardstick competition.

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[24] Bethlehem Steel filed exceptions jointly with General Motors Corporation, Occidental Chemical Corporation, Olin Corporation, and Union Carbide Corporation.

The MDAs and VDPS also argue that limiting preference power to MEUA-type entities encourages enclaves of over-consumption and artificially low rates, resulting in inefficient pricing and operations. Finally, Rochester maintains that the term yardstick competition implies competition through measurement, and that the analysis therefore should be limited to comparison of rates and quality of service.

CMEEC and the City of Cleveland argue that Congress was concerned only with encouraging public utility yardstick competitors, not yardstick competition between investor-owned utilities. They state that regardless of the MDAs' and VDPS' ability to provide some type of yardstick competition, their ties to investor-owned utilities prevent them from being the kind of yardstick contemplated by the court's interpretation of the NRA.

Staff states that the court in *PASNY* found that yardstick competition exists if the public body and the IOU actually compete for the same customers, and argues that the threat of displacement is a lesser degree of this type of competition. Staff and CMEEC add that PASNY's argument that displacement shows the failure of yardstick competition is irrelevant, since the ALJ required only a threat of displacement, not actual displacement.

Staff also responds that the IOU's bills do not permit the rate comparisons PASNY claims are possible. The bills state neither price nor amount of preference power received, but only that the customer saves a certain amount due to the receipt of preference power.

3. Arguments on Direct Responsibility and Control

The MDAs, the New York PSC, and VDPS argue that the requirement that the public body have unrestrained control of the distribution system, and have the ability to employ cost-cutting measures and ensure continuity of service for the distribution system, is equivalent to an ownership requirement, which the Commission has rejected. VDPS suggests that, in requiring unrestrained control, the ALJ has confused distribution with delivery, and that the distributor does not have to control the physical delivery of its product or service. In fact, it states, the refusal of an entity with control over essential local distribution facilities to provide its competitors with access would be anticompetitive.[25]

Staff responds that the Commission has previously required non-owners to attain a greater level of control than is common in leases,[26] and that to protect NRA interests an NRA public body that leases a distribution system must attain a level of control that is as complete as an owner would have. MMWEC and CMEEC add that Opinion No. 229-A, which clarified that ownership was not required, did not suggest that lessees are to meet criteria less restrictive than those which must be met by distribution system owners.[27] They add that lessees can meet the ALJ's standard, and that there are instances in which lessees have gained precisely the sort of operational control which VDPS and the MDAs claim is unavailable to them.[28]

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[25] Orange and Rockland cites *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973), for the view that some level of cooperation among competitors may be required as a matter of law. However, that case involved sales at wholesale and wheeling service (transmission), not distribution.

[26] Staff cites Article 5 of the standard terms and conditions for hydroelectric projects, *e.g.*, 54 FPC 1792 at 1826 (1975); *Boott Mills*, 25 FERC ¶61,386 (1983); and Article 16 of PASNY's license, 19 FPC 186, at 193 (1958) (referencing 16 FPC 1284 at 1287-88) (1953). Article 5 requires the licensee to acquire title in fee or the right to use in perpetuity all lands needed for the project. Boott Mills states that anyone with operational control must be included as a licensee. Similarly, Article 16 of PASNY's license requires PASNY to retain control of all project property used with other entities unless there is specific Commission approval.

The MDAs and VDPS argue that the limited preference power available requires a sharing of customers, and therefore that a public body should only be required to obtain sufficient control of a distribution system to enable it to provide for distribution of the power it has undertaken to supply, and to get the power to the customer. They argue that through the lease and operating agreements they have met these criteria.[29]

Staff, MMWEC, and Cleveland argue that "providing" for distribution and "getting" power to the customer does not constitute the direct distribution required by the NRA. Cleveland notes that, when originally found not to be a public body, VDPS was "getting power" to the meters of the private utility customers. However, VDPS was not "getting it to them" itself directly, but had arranged for some other entity to do it for them. Furthermore, staff states that the fact that the quantity of available preference power is limited does not justify a sharing of responsibility for distribution between the MDAs and IOUs. It states that public bodies legally can and do purchase supplemental power from wholesale suppliers which would satisfy the customers' energy needs not satisfied by preference power,[30] and that the MDAs and VDPS should also do so.

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[27] CMEEC points to cases in which private power companies leased the facilities of a publicly owned utility for 20 to 30 years. By leasing the facilities, the publicly owned utility lessor maintained ownership, which would revert after the expiration of the lease, but the private power company lessee retained full control of the distribution facilities and full utility responsibility until such expiration. See *Pacific Gas & Electric Co.*, 43 FPC 753 (1970); *Carolina Power & Light Co.*, 39 FPC 483 (1968); *Arizona Public Service Co.*, 35 FPC 1085 (1966).

[28] *Pacific Power & Light Company*, 3 FERC ¶61,119 (1978); *American Louisiana Pipeline Company*, 30 FPC 1211 (1963).

[29] City Service argues that the ALJ erred in failing to give any weight to the New York PSC's ruling that MDAs have sufficient control. However, the ALJ correctly found the matter to be outside the New York PSC's jurisdiction, and so not binding on this Commission. Congress gave no role to the New York PSC in the allocation of power.

The MDAs and VDPS argue that the ALJ's finding that control excludes sharing of responsibility[31] fails to take into account the nature of competition in the electric industry. VDPS states that one can be engaged in the utility business by buying and selling electric energy[32] without owning or operating generating stations, transmission lines, or distribution facilities.[33] They maintain that in *Town of Massena v. Niagara Mohawk Power Corp.*,[34] the ALJ recognized that a company need not control the entire length of lines or feeders which serve its customers, or meet all necessary facilities, and may depend upon others' lines or facilities to help them render the service. In addition, VDPS argues that commonplace borderline agreements (arrangements under which the customers of one retail distributor are served over the facilities owned and controlled by another) and wheeling of transmission over the distribution facilities of a competitor would be precluded under the ALJ's definition of control, since they would involve sharing of the service responsibility.[35]

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[30] Staff notes that the public bodies comprising CMEEC and MMWEC receive enough preference power to serve only a small portion of their full loads, and that they take responsibility for securing additional sources of generation to meet customer needs.

[31] 42 FERC at 65,164.

[32] *See* 40 FERC ¶ 61,336 (1987).

[33] *See* 35 FERC ¶ 61,198 (1986).

[34] 13 FERC ¶ 63,036 (1980), *vacated*, 20 FERC ¶ 61,406 (1982).

Staff acknowledges that the MDAs and VDPS fit the broad definition of an electric utility, but states that this only indicates that they are involved in sales for resale and is not relevant to whether they are involved in the distribution business within the meaning of the NRA. Staff adds that, although a public body can obtain generation and transmission services through contract, the existence of a contract does not constitute control. Staff also argues that the level of control involved in purchasing wheeling services does not satisfy the NRA, and that public bodies with borderline agreements would not be public bodies as to the portion of their customers served under the borderline agreement.

Finally, VDPS argues that, if direct responsibility is defined to preclude the sharing of responsibility for the supply of power delivered to a retail customer, the definition contradicts the ALJ's conclusion that a public body need not supply all of the power requirements of a customer, but need only substantially meet its requirements.[36]

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[35] The parties argued before the ALJ that they have the same control over distribution that MEUA-type entities have over generation and transmission. The ALJ correctly stated that generation and transmission were not relevant, since the NRA requires control only over distribution. On exceptions, the parties persist in this argument. VDPS maintains that the ALJ erred because distribution, transmission and generation are not separate functions, and the question is not whether an entity must have control over all three, but how much control over the functions is enough. It then maintains that public bodies obtain requisite control over all three by contract.

City Service also argues that the ALJ was wrong to consider distribution as a separate function from generation or transmission, and that since generation or transmission contracts need not give the public body exclusive operating control over the contracted-for generation or transmission facilities, a distribution contract should not be required to give such control.

C. *Discussion*

As noted in the background discussion, *supra*, Section 836(b)(1) and Article 20 of PASNY's license state:[37]

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[36] The MDAs and VDPS also raise a number of miscellaneous arguments: (1) that the Commission's reference to direct responsibility in Opinion No. 229-A did not establish it as a separate criterion, but simply rearticulated the view that only retail distributors, not wholesalers, are capable of selling and distributing power directly to consumers of electricity at retail; (2) that the terms "direct responsibility" and "control" are not found in the statute or in the court decisions, but were a creation of the ALJ; (3) that the ALJ's use of dictionary definitions for "directly" and "control" was improper or contradictory; (4) that the court stated that the Congressional intent was to give the local entities the right to decide on the ultimate retail distribution of the preference power sold to them, and that this should apply to selection of the form of delivery arrangement; and (5) that control was only raised by complainants as needed to ensure that a public body could supply its customers' full requirements, and that, since the ALJ rejected the full requirements criterion, complainants have not met their burden of proof on the control issue. These arguments are all without merit. The requirement for direct responsibility is established by court and Commission precedent which refer to "direct" distribution to the retail customer. *See* Opinion Nos. 229 and 229-A, and *MTA*, *supra*. The Commission's direction in the hearing order that the ALJ develop criteria for determining when an entity that does not own a distribution system may qualify as a public body is the authority for his control criteria, and his view that an entity must have control of the distribution system in order to distribute directly is a logical interpretation of the precedent. The court's statement that local entities should have the right to decide on ultimate retail distribution referred to selection of customers, not means of distribution. Finally, control is relevant not merely to the ability to meet customers' requirements but to doing so directly, and the ALJ's findings on full requirements do not eliminate control as a criterion.

[37] 16 U.S.C. §836(b)(1).

> In order to assure that at least 50 percentum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 percentum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers. [Emphasis added.]

In contending that they should be considered innovative alternative public bodies, and in their attacks upon the ALJ's yardstick and direct responsibility criteria, the MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has been repeatedly rejected by the courts and the Commission.

In *PASNY*,[38] the court found that PASNY had failed to fulfill the requirements imposed by its license to make flexible arrangements for the withdrawal of enough power to meet the "reasonably foreseeable" needs of preference customers. This failure resulted in private utilities receiving preference power which should have gone to public bodies.[39] In that proceeding the court fully discussed the legislative history of the NRA. The court stated that Congress considered two alternative bills. The Clark bill created a federal preference requiring that the project power be sold to rural cooperatives and municipal utilities, on the theory that the price charged by those bodies would provide a "yardstick" that would force down the rates charged by private utilities to domestic and rural consumers. The Ives-Javits bill would have created a state preference under which priority would be given directly to consumers as end-users. The court stated that the NRA terms constituted a compromise between the two bills, but that the compromise was only over the extent of the NRA's preference provision (that is, affecting only 50 percent rather than 100 percent of the power), not its nature. The court found that the legislative history showed a clear intent to adopt for 50 percent of the Niagara Project power a "federal type" preference, including the concept of "yardstick competition," "... which assumes that if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all.... It is not for the Commission or the courts to second-guess that basic determination."[40]

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[38] *Supra* n. 17.

[39] PASNY did supply the public bodies with equivalently priced power from other sources.

In Opinion No. 229, *supra* at n. 17, the Commission found that PASNY had not made a reasonable amount of preference power available for preference customers in neighboring states, and that VDPS, a power wholesaler, and MTA, a power consumer, were not public bodies. In that order the Commission found that defining as a public body an entity that would resell preference power to both publicly owned and privately owned utilities would subvert the goal of yardstick competition.[41] In Opinion No. 229-A, which affirmed Opinion No. 229, the Commission stated that "Congress did not intend to provide preference power to the customers of investor-owned utility companies. Congress believed that these customers would benefit indirectly from the additional competition in the market-place."[42]

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[40] 743 F.2d at 105.

[41] *See* Opinion No. 229, *supra* n. 17, at 61,650.

[42] 32 FERC at 61,444.

In *MTA, supra* n. 17, which affirmed Opinion Nos. 229 and 229-A, the court further elaborated upon the nature of a public body. The court stated that Congress believed that it was necessary to create publicly owned power because electric power distribution tends to be a monopoly, and the only way to gain for the consumer the normal benefits that flow from competition is to develop public power yardsticks. The court further stated:[43]

> The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return. *Power Authority of the State of New York, supra,* 743 F.2d at 105.
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> Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers. If the "public body" used the preference power itself, the privately-owned utilities would not face any pressure to reduce the prices they charge other customers. Similarly, if the "public body" simply resold the preference power to the privately-owned utilities (as did VDPS) the preference power would not have fostered competition.

Furthermore, the court cited legislative history requiring that the "public body" must control distribution. The court stated:[44]

> As Senator Neuberger observed, "public generation is not enough. The power must be made available to public and cooperative distributing systems, so that the public operation will extend from the turbine to the reading lamp in the living room. Only in that way is competition

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[43] 796 F.2d at 592.

[44] 796 F.2d at 592.

> established." S. Rep., *supra*, at 10. *See also* S. Hearings, *supra,* at 12-13 (Sen. Clark).

The court added:[45]

> Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

The court further stated:[46]

> [A]t least one senator stated that the preference clause gave priority to "municipalities which purchase or generate and sell their own power," 103 Cong. Rec. 14440 (Sen. Clark), as did congressmen and experts who treated "municipal utility," "municipal plant," "municipal electric system," and "municipal system," as synonymous with "public body" in their testimony.... In fact, it was implicit throughout the debates that "public bodies" were publicly-owned entities capable of distributing the preference power they received. The primary argument made by critics of the preference provision was that the provision would foster inefficiency by encouraging municipalities to qualify as buyers of preference power by building transmission lines and electric plants duplicating those of the privately-owned utilities... . Obviously, that argument would have had little force if government bodies could receive the power whether or not they had the means to distribute it.

Based on these clear precedents, we conclude that the NRA requires promotion of competition between publicly owned and privately owned utility systems at retail. Congress did not intend the customers of IOUs to receive preference power, but, rather, mandated that they receive the benefit indirectly through the lower rates the private utilities would charge in response to the competition from the public bodies receiving preference power. Thus, the MDAs' and VDPS's argument that they can give a greater number of end-users access to the power is irrelevant if the MDAs and VDPS do not themselves sell and distribute the power directly to the retail consumer, but instead are giving that access to the customers of IOUs.

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[45] *Id.*

[46] *Id.*

The ALJ's three yardstick competition criteria (threat of displacement, supply of substantial requirements, and opportunity for rate comparison) are appropriate ways to promote competition at retail between public utilities and IOUs. If these elements are absent the customer does not have a real choice among competitors. The kinds of alternative competition to which the MDAs and VDPS refer either are not at retail (bulk competition is wholesale competition), do not relate to consumer rate comparisons but to "regulatory" comparisons, or do not involve sufficient separation of the supposedly competing entities to ensure that comparison is possible.

The ALJ correctly found that to "sell and distribute power directly to consumers of electricity at retail" requires direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity must have control over its distribution system.[47]

We agree with staff that although ownership is not required, control can and must be obtained by lease. What the MDAs and VDPS propose as "sufficient" control in reality leaves the IOUs in control of distribution.

The ALJ's rejection of a full requirements criterion in favor of the requirement that a public body serve "substantially all" of its customers' energy needs is not, as the MDAs argue, an endorsement of partial requirements but is meant to permit some flexibility in situations where a customer meets certain of its needs through self-generation, where a large industrial consumer is served by more than one supplier, or where an entity has borderline customers but retains responsibility and control for its other customers.

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[47] The ALJ did not confuse distribution with delivery, as argued by VDPS. A distribution system is that portion of an electric system used to deliver electricity from points on the transmission or bulk power system to the consumers.

The MDAs' and VDPS's arguments that the ALJ failed to recognize the nature of electric competition also lack merit.[48] It is true that one need not own generation, transmission, and distribution facilities to engage in the utility business. However, engaging in the utility business does not qualify an entity to receive preference power under the NRA.

Lastly, the control requirement does not preclude borderline or wheeling agreements. Wheeling is related to transmission, and only control of distribution is required here. Second, although borderline agreements are those in which the customers of one electric system would receive electric service from another system by appropriate arrangements between the two systems, under such agreements both companies still control their own distribution systems and bill their own customers.

IV. Are MDAs Public Bodies?

A. *The ALJ's Findings*

The ALJ found that City Service is not a public body because: (1) the New York City consumer must be a customer of the privately owned utility to obtain City Service preference power, and thus does not have a choice of suppliers; (2) City Service's customers cannot compare rates because City Service's rates do not appear on the dual City Service-Con Edison bill; (3) City Service's failure to substantially meet the energy needs of its customers negates its claim to be a yardstick competitor, and (4) various provisions in the lease and operating agreement (paragraphs 3, 17, 18, 21, and 25)[49] demonstrate City Service's lack of control and of direct responsibility. The ALJ found that the other MDAs have lease and operating agreement terms identical to those of City Service, and thus also are not public bodies.

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[48] In reference to the citation by the MDAs and VDPS to the *Town of Massena* case, the initial decision in that case was vacated by the Commission because the complaints were withdrawn, and therefore the issues there were never acted on substantively by the Commission. *See Town of Massena v. Niagara Mohawk Power Corp.*, 20 FERC ¶61,406 (1982).

B. *Arguments of the Parties on Exceptions*

City Service, the County of Westchester Public Utility Service Agency (Westchester), and Upstate argue that they are public bodies. They essentially repeat the arguments made before the ALJ. City Service argues that many industries in New York City do have a choice of suppliers among City Service, Con Edison, or a cogenerator, and that most retail consumers, including those served by the complainants, must be customers of a local utility.

City Service argues that although its rates do not appear on City Service-Con Edison bills, the bill states the savings due to the purchase of City Service power, and the customer can, by adding back the savings, compare it with what the bill would be if City Service had not been supplying power. City Service suggests that savings are a more effective yardstick for businesses than simple rate comparison. It also maintains that the New York PSC rate proceedings function as a forum for comparison of the activities and performance of City Service and Con Edison.[50]

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[49] Paragraph 3 of the lease and operating agreement provides that Con Edison shall have exclusive control of its entire system and shall continue to have the franchise responsibilities of supplying electric service to customers in its present service territory. Paragraph 21 states that Con Edison remains responsible to the city's consumers for continuity of electric service to the same extent (but to no greater extent) as in the absence of the lease and operating agreement. Con Edison has the right to suspend or terminate the agreement under paragraph 17 if the proposed arrangements result in higher energy costs for the city's consumers, under paragraph 18 if the city institutes condemnation proceedings against Con Edison, and under paragraph 25, if implementation of the agreement would result in an increase in Con Edison's rates to its customers.

[50] The New York PSC also suggests that its approval under Section 70 of the Public Service Law of New York should be considered to permit sufficiently direct distribution.

City Service argues that substantial requirements service is not a criterion for being a yardstick competitor, but that its 5000 manufacturing customers do receive a substantial amount of their service (about 50 per cent of their electric needs) from City Service, and that City Service will be providing full requirements service to purchasers of Fitzpatrick nuclear power.[51]

City Service maintains that the ALJ misinterprets the lease and operating agreement. It states that the statement in paragraph 3 that Con Edison shall have exclusive control merely acknowledges that Con Edison retains physical control of the system, and that the test should be whether the lease and operating agreement provides City Service with sufficient control of the distribution system to enable its power to be distributed, not whether it has exclusive physical control of the system.[52]

City Service argues that the language in paragraph 3 concerning the continuance of Con Edison's service merely requires

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[51] Because the amount of preference power sold to City Service was small and would serve only a fraction of the total electrical requirements of all city consumers, City Service decided to target 60 per cent of its hydropower allocation for sale to manufacturers. It hoped that targeting sales to this population would make these employers remain in the city and would provide a clear example to consumers of the value of a public-power alternative. It maintains that this mix of sales to residential and business consumers is similar to the practice of MEUA members, who sell, on average, 58 percent of their preference power to commercial and industrial users.

Staff states that the MDAs do not compete with Con Edison for these customers in Con Edison's franchise area. Nor does the sale of Fitzpatrick power demonstrate competition between City Service and Con Edison, since the purchases are only for industrial customers which would not have been served by Con Edison absent City Service, because they would have located elsewhere.

[52] City Service argues that "directly distributing" should be defined to include hiring Con Edison to perform the distribution function, since the power is transferred from City Service's transmission system directly to the meters of its customers. City Service analogizes its situation to a mail order house distributing by using UPS for delivery service.

Con Edison to ensure the balance of the electric needs of City Service's customers which City Service does not supply. It states that the provision was necessary because PASNY would not give City Service sufficient power to serve the full needs of all of its customers, as it did for the members of MEUA. City Service further argues that when it purchases firm power, it accepts the responsibility for firm supply of all or part of its customers' electrical requirements. Therefore, it is City Service, not Con Edison, that is responsible for meeting these customers' power supply needs.

City Service argues that while the ALJ interpreted paragraph 21 as meaning that City Service is unable to control the quality of service rendered to its customers, the purpose of the provision is to assure that City Service's customers receive acceptable service from Con Edison, as City Service's agent.

City Service argues that paragraph 17, which permits suspension of the arrangements, merely recognizes that if the City Service's hydropower sales raise the total energy costs for dual City Service-Con Edison customers, such customers will no longer be interested in purchasing the hydropower, and both competitors would want the option to suspend the agreement.

City Service claims that there is an emerging trend in the electric utility industry to give utilities the ability, for a reasonable fee, to use the distribution and transmission systems of others; therefore City Service believes it will be able to gain access to Con Edison's facilities even if Con Edison should elect to terminate the lease and operating agreement under paragraphs 17, 18, or 25. Likewise, City Service argues that if Con Edison terminated the agreement under paragraph 18 because City Service brought condemnation proceedings against it, City Service could force Con Edison to give it the right, for a reasonable fee, to use the Con Edison distribution and transmission facilities.

Finally, City Service suggests that access to low-cost preference power amounts to a subsidy which allows MEUA's members to charge rates too low to constitute a basis for comparison with rates of utilities not so favored. It suggests that some reduction in the allocations of MEUA members may improve yardstick competition by giving the nonpreference utilities at least a fighting chance of competing.

Westchester states that its share of NRA preference power would be insufficient to serve all citizens currently served by Con Edison's distribution system in Westchester County, and that condemnation of the system would be so expensive as to be impractical. It chose to sell some power to all, and leave Con Edison to supply remaining power needs, with the benefit of lower rates to all, rather than carve out a small group of citizens, supply them with all their needs from Westchester's low-cost preference power, while Con Edison supplied the vast majority of its citizens with higher cost power. Westchester adds that Con Edison's responsibility for continuity of electric service was not intended to deprive Westchester of responsibility or control, but to protect its citizens against shortfalls in electric power supply.

Upstate notes that, under contracts being discussed, its members will be able to select their own customers and set terms and rates of service, and that its members will be responsible for arranging transmission. It states it has negotiated a rate provision with Niagara Mohawk that will base the charge for distribution solely on that utility's distribution costs and investment, and argues that credit on the bill sufficiently shows the benefits of preference power.

Staff responds that City Service's lease and operating agreement makes it clear that Con Edison has exclusive control and direct responsibility. Staff states that the rate is composed primarily of a rental payment to Con Edison based on Con Edison's total costs, including generation, minus the cost of purchased power and fuel. City Service's cost of administration, payments to PASNY for the power, and payments for transmission are included in the rate. Staff argues that more than 70 percent of the rental charge is not attributable to the distribution function.

Staff responds that City Service has never undertaken to purchase firm power and accept responsibility for firm supply of all or part of a customers' requirements, that Con Edison never relinquished those functions, and that the lease and operating agreement is effective only so long as City Service continues to receive preference power.

Staff adds that the ALJ's order is not hostile to leasing arrangements which only fulfill partial requirements with preference power. Indeed, none of the qualified out-of-state public bodies receive sufficient amounts of preference power to meet their demands. However, the balance should be obtained by purchasing power or by self-generation.

Staff states that, because Upstate does not have a signed lease and operating agreement, it is not possible to make a determination on what its public body status will be, once it has made arrangements with an IOU for distribution. Until then, it does not qualify.

C. *Discussion*

We have found that the ALJ's criteria for a public body are correct. A public body must provide yardstick competition. It must operate in such a manner as to create a threat of displacement of the private utility, substantially serve the needs of its customers, and provide an opportunity for rate comparison. A public body must also directly sell and distribute its preference power to its retail customers, and direct distribution requires that the public body control the distribution system.

The arguments of City Service, Westchester, and Upstate do not meet these criteria, but rather attempt to alter them based on the MDAs' desire to give as many end-users as possible the benefit of the preference power.[53] As found by the ALJ, the MDAs' lease agreements do not show any separation of these supposedly competing parties, but, rather, show the IOUs to retain complete control of the distribution system. Specifically, the lease agreements show the following: (1) the IOU retains the franchise responsibility to supply the full requirements of its customers for electric service; (2) the IOU remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU; (3) the IOU has exclusive control of its entire system, leaving no room for assertion by the MDAs of control over distribution facilities; (4) the IOU may suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted against the IOU; and (5) the IOU issues the bills, which do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power, thus giving no opportunity to compare the quality of service or price.

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[53] Since Upstate does not yet have a distribution system in place, its qualifications cannot be determined. However, the proposed leases it describes appear to have the same problematic features as the other MDAs' leases.

In addition to the above, the consumer must be a customer of the privately owned utility, or service is not available. Thus, the consumer has no real choice between utilities. There is insufficient separation of functions between the MDAs and the IOUs to create a threat of displacement, to allow the MDAs substantially to serve their customers' needs, or to provide an opportunity for rate comparison.

V. Is VDPS a Public Body?

A. *Background*

In Opinion No. 229[54] the Commission found that as a wholesaler of power VDPS would not be able to provide the competition at retail required of a public body. The State of Vermont then enacted legislation (Section 212a)[55] enabling VDPS to sell and distribute a firm supply of Niagara power at retail, and VDPS entered into lease arrangements by which it distributes its power to end-users over the facilities of other distributors. On rehearing in Opinion No. 229-A, the Commission stated that it could not determine, on that record, whether Section 212a enabled VDPS to qualify as a public body, and left it to PASNY to determine in the first instance whether VDPS' arrangements, formulated under the legislation, qualify it as a public body.[56] In this proceeding, the complainants have challenged PASNY's determination that VDPS qualifies, and PASNY's allocation to VDPS of preference power.

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[54] 30 FERC at p.61,651.

[55] 30 V.S.A. § 212a (1985).

B. *The ALJ's Findings*

The ALJ found that VDPS does not qualify as a public body.[57] Specifically, the ALJ found that although VDPS' operations exhibited one of the elements of yardstick competition (it supplies a substantial percentage of Vermont residents' electric needs), they did not exhibit other elements, such as adequate opportunity to compare rates or quality of service, or real competition for new customers. He also found that VDPS did not

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[56] 32 FERC at p.61,451 n.12.

[57] On May 27, 1987, after the close of the record, the Governor of Vermont signed into law bill S.130, which Vermont alleges further expanded the authority and responsibilities of VDPS. Vermont attempted to submit the bill in evidence. The ALJ took official notice of the legislation but found that legislation enacted after the close of the record is irrelevant because new legislation cannot affect what has already transpired, and because there would be no way to know whether VDPS would act differently under the new legislation than it has acted under Section 212a. He added that there comes a time in every proceeding when the record must close.

VDPS has renewed its request for reopening the record to consider the effect of S. 130. VDPS states that it submitted both its motions requesting official notice and reopening of the record before reply briefs were to be filed, and that the real issue is not whether S. 130 affects what has already transpired, but rather, whether existing legislation affecting VDPS's current and future status as a public body should be considered. VDPS states that changes in law are an express reason for reopening the record under Rule 716, and it cites the Commission's duty to supplement the record, even at the conclusion of a hearing, as well as the Commission's duty to inform itself of the facts before it decides the case.

(Footnote Continued)

have direct responsibility for distribution to the retail consumer or control of the distribution system.[58]

C. *The Arguments of Parties on Exceptions*

VDPS argues that its customers can readily make rate comparisons. It points to its continuing efforts to get its rates put on the private utilities' bills despite significant company resistance (which it claims is itself evidence of the existence of yardstick competition), and the Vermont Public Service Board's recent

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(Footnote Continued)

VDPS' request is denied. The legislation may or may not authorize VDPS to make changes which would qualify it as a public body under the terms of the NRA, but there is no evidence in the record of how that authority has been implemented by VDPS. There is no evidence that the lease and operating agreements setting forth the responsibilities of the utilities and VDPS have been replaced since the new statute became effective. Moreover, the Commission has previously ruled that PASNY is to be the first to determine the legality of arrangements when it grants or denies VDPS preference power, and the Commission is to review those determinations. 30 FERC at p. 61,451 n. 12. PASNY has not ruled on any new arrangements made under the new legislation.

As noted in the section of this order on preliminary issues, VDPS's June 5, 1989 motion to lodge an order of the Vermont Public Service Board is also denied. The order, which is apparently proffered as an example of how S. 130 is being applied, does not show how VDPS is implementing S. 130 in relation to the nature of its leases and billing services, and the amount of control VDPS does or does not have over distribution. *See also* 32 FERC at p.61,451 n. 12.

[58] *See* 42 FERC at pp. 65,171, 65,172. As examples, the ALJ stated that the costs of operations are basically those of the utility, not those of VDPS, and that therefore there is no opportunity to compare quality of service, that rate comparison is not readily available, and that to be supplied electricity by VDPS, the resident must also be a customer of the privately owned utility. The ALJ also found that VDPS has no direct responsibility to retail customers for the electric energy sold and delivered to them, since under the lease and operating agreements and the service contracts the utilities perform all the utility functions.

promulgation of Rule 4.200, which allegedly requires utilities to identify VDPS and to state its rates separately at least once per year.[59]

VDPS adds that comparisons can also be made because the rates and tariffs are filed with the Vermont Public Service Board, and that its retail rates are a yardstick against which the performance of other retail suppliers can be, and is, measured by regulators such as the Wisconsin and Connecticut state utility commissions.

VDPS notes that it supplies the full energy requirements of 20 percent of Vermont's rural and domestic customers, a larger share than 22 of the 24 remaining retail electric distributors in the state, and that it will supply electricity to any resident on request.[60]

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[59] VDPS states that, by the close of the record, its name, rates, and charges were placed conspicuously on the bills of customers served by the state's two largest utilities, Green Mountain Power Corporation and Central Vermont Public Service Corporation. Agreements had been reached for similar information to be provided on the bills of customers served by seven other utilities within a period of two months. VDPS states that it has disseminated this information to its customers in a variety of other ways: bill stuffers informing customers that VDPS is in the business of distributing Niagara power directly to them, public notices of VDPS's tariff filings published in newspapers of general circulation, and rates on file with the Vermont Public Service Commission. Information about VDPS's retail activities, including refunds it has obtained from PASNY, has been discussed on television, in newspaper articles, and on bill stuffers circulated to all VDPS customers. VDPS also operates a toll-free consumer affairs hotline to handle customer inquiries.

VDPS argues that if the comparison must be available on the bills themselves, not one of the complainants would qualify, since the customers must go to the files of the state commission to compare the rates of competing private utilities. This argument, however, misses the point. VDPS's rates need to be stated so that the consumer can distinguish them from the IOU's rates and service. Since the complainants' bills state only their own rates, that fact distinguishes their rates and service from that of the IOUs.

VDPS argues that yardstick competition should not be limited to the ALJ's three elements, and that the Commission should consider other forms of competition that VDPS does provide to promote yardstick competition.[61] In particular, VDPS states that it promotes franchise competition, which it defines as competition for the right to serve in a given territory. It states that such competition is demonstrated here by the private utilities' opposition to legislation authorizing VDPS to distribute power at retail. It maintains that their opposition acknowledged the threat of expansion of VDPS's authority which such legislation constitutes. VDPS stresses that franchise competition is not dependent upon actual passage of legislation creating new public bodies; it is the threat of their formation that constitutes franchise competition. Thus, although VDPS had limits on its retail distribution authority, the potential for legislative expansion of that authority was a competitive concern for private utilities.[62]

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[60] VDPS argues that the ALJ's holding that VDPS fails to provide yardstick competition because it does not compete for new customers contradicts his earlier conclusion that public bodies need not compete for individual customers to provide yardstick competition. Staff correctly responds that the ALJ was only rephrasing his concern that under the lease and operating agreements a retail customer cannot receive preference power unless it is a customer of an IOU.

[61] VDPS states that it provides competition by example in five ways: (1) its rates provide a regulatory yardstick against which the performance of other retail suppliers can be measured; (2) its rates form a basis for comparisons made by electric consumers in the state; (3) its sales at retail directly displace retail sales that would otherwise be made by the state's remaining retail suppliers; (4) it provides competition akin to franchise competition; and (5) its presence provides a further stimulus to conventional franchise competition in the same way as does the existence of a municipal public power system.

[62] VDPS argues that the ALJ erred in excluding exhibits V-31 and V-32, which discussed the private utilities' opposition to the legislation. The ALJ correctly excluded the exhibits. The private utilities' opposition to the legislation was irrelevant to the issue of displacement on which the exhibits were proffered. *See* discussion, *infra*.

VDPS argues that its existing wholesale operations, which account for roughly eighty percent of its total sales, make the possibility of its expansion a more immediate competitive threat than it would otherwise be. VDPS also argues that requiring the separation of costs of operation would effectively preclude lease arrangements, which the ALJ had found could substitute for ownership, but which would, of necessity, involve use of facilities whose costs are basically those of the utility. VDPS argues that resulting retail rates, not comparisons of cost components, are what influence customer decisions.[63]

VDPS further asserts that it is directly accountable to its ratepayers for price and quality of service. As evidence of this it states that if VDPS does not take PASNY power, VDPS, and not the private utilities, is responsible for payment of PASNY demand charges. If power is delivered by the private utilities, they collect revenues from VDPS's customers as the agents of VDPS and reimburse VDPS. VDPS possesses title to the power sold. VDPS collects its costs from ratepayers only if it sells power. VDPS's rates, terms and conditions of service are on public file with the Vermont Public Service Board, VDPS is bound by those rates, and the tariffs, like those of other distributors, are subject to challenge by rate payers before the board.

D. *Discussion*

We agree with the ALJ's finding that VDPS is not a public body. VDPS does not have direct responsibility and control of a distribution system. As noted by staff on exceptions, Section 212a of the Vermont statutes is limited in scope. It applies only to PASNY power from PASNY's Niagara and St. Lawrence projects; it only authorizes VDPS to enter into agreements, and it does not authorize VDPS to take over or condemn distribution facilities. VDPS implemented the new authority by entering into contracts to have its share of PASNY power distributed by various IOUs to the utility's customers. Each of the companies leases to

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[63] Staff responds that, where the costs of operations are those of the utilities, there is no incentive to achieve cost reductions or operating efficiencies, and therefore there is also no basis for comparison.

VDPS an undivided interest in that company's distribution system to the extent required to distribute PASNY power to the customers in the service territory of the company. The company maintains and operates the leased facilities and is responsible for any engineering, construction, and dispatch service needed to distribute the power. There is also a service contract between VDPS and each company under which the company performs effectively every utility function, including all metering, billing collection services, power deliveries, and other services. All payments are made to the company. In short, the distribution and customer service functions that a customer expects from its utility are performed by the company, not by VDPS.

Furthermore, since VDPS leases its distribution facilities from the IOUs, and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus no benchmark is possible, and VDPS does not foster yardstick competition.

In addition, VDPS's arguments concerning rate comparisons and alternative forms of competition are without merit. Vermont's passage of Rule 4.200 suggests an effort to have its rates shown on electric bills. However, Rule 4.201 requires only that price components, from which the customer can calculate the bill, be stated. Even if the rates themselves were shown, a requirement that rates be shown separately only once per year does not provide sufficient opportunity for rate comparison. Nor does the filing of rates with the Vermont Public Service Board sufficiently inform consumers of the rate for preference power for purposes of rate comparison. Furthermore, we have already found that the other forms of competition proposed as yardsticks do not serve the purposes of the NRA. Finally, the threat of legislation which would expand VDPS's authority, absent passage and implementation, does not constitute yardstick competition or a threat of displacement.

VI. Requests for Relief

The complainants requested that the ALJ restore to the qualified NRA public bodies of the Niagara Project preference power unlawfully allocated to the MDAs and VDPS since July 1, 1985. They also requested that the ALJ order PASNY to allocate and sell preference power only to traditional publicly owned distribution systems or rural electric cooperatives, unless PASNY applies to and obtains from the Commission prior approval to sell to another type of entity which it claims meets the criteria.

The ALJ found that retroactive relief is not warranted, since, although PASNY acted incorrectly, it acted in good faith. He also noted that the Commission has refused to give this sort of relief in the past, since the amount of preference power is limited, and innocent parties might have to lose preference power in order to accomplish the relief. The ALJ declined to make a finding on whether PASNY should be required to seek prior Commission consent for future allocations of preference power to alleged public bodies which are non-traditional, leaving that decision to the Commission.

On exceptions, Cleveland, MMWEC, CMEEC, and Allegheny Electric Cooperative (Allegheny) argue that a showing of bad faith is not a requirement for granting retroactive relief, that in any event PASNY has demonstrated bad faith, and that no innocent parties need be injured by the granting of retroactive relief. In addition, they argue that the prospective remedy of requiring Commission approval of sales to alleged non-traditional public bodies is necessary to prevent further bad faith behavior by PASNY.

A. *Retroactive Relief*

The complainants argue that the ALJ's standard for retroactive relief is incorrect. They argue that the denial of retroactive relief is based on a three-pronged test set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*Chevron*), under which there must be: (1) a clear break with the past, (2) consideration of whether retrospective operation will further or retard the purpose of the rule in question, and (3) a weighing of any inequity imposed by retrospective application. These parties argue that the standard the ALJ applied was already established by Opinion No. 229-A, and therefore there was no break with the past, that retroactive relief would further the purpose of the NRA by restoring rights to the legitimate preference power entities, and that PASNY will not be injured by the relief.

VDPS responds that the result concerning VDPS clearly was not foreshadowed in earlier cases, since the ALJ found that VDPS possessed at least some of the attributes of a public body, and that VDPS comes closer to meeting the yardstick competition requirements than do the MDAs.[64] It maintains that the ALJ's findings establish the closeness of the issues, and therefore the impropriety of retroactive relief.

Cleveland, MMWEC, CMEEC, and Allegheny allege that in allocating power to the MDAs, PASNY, acting in bad faith, disregarded clear legal precedent, and that this was only one event in a continuing history of deliberate attempts to circumvent the NRA in order to provide preference power to all residential customers in the state of New York, including those that are customers of IOUs.[65]

The complainants also argue that, instead of examining the eligibility of the MDAs and VDPS on an individual basis to determine whether they qualified legally as public bodies, PASNY relied upon the representation of the MDAs and VDPS themselves. They note that four MDAs (Westchester, City Service, Rockland County, and Orange County) began receiving

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[64] See 42 FERC at 65,171-172.

[65] These complainants point out that the former Chairman of PASNY, Chairman Dyson, originally proposed the establishment of the Rural and Residential Energy Authority, which would buy preference power from PASNY for resale at cost only to the residential customers of the four down-state investor-owned utilities. They charge that, when the proposal was not passed by the state legislature, PASNY encouraged the formation of the MDAs as devices to evade the preference provisions of the NRA. They also note a Con Edison memorandum, which refers to a PASNY official's statement that they could call their agreement a lease, and PASNY would not look behind the label.

(Footnote Continued)

preference power even though their lease and operating agreements all defined eligible customers as the customers of the local IOU. They also note that, at the time PASNY's trustees determined VDPS was an NRA public body and made an allocation to it of preference power, VDPS had no arrangements for distribution of the energy, and the contracts under which VDPS alleged to distribute have never been reviewed.

PASNY and Orange and Rockland respond that PASNY did not disregard clear legal precedent, since there was none. PASNY states that the Commission's order establishing the hearing stated that Opinion Nos. 229 and 229-A did not resolve the legality of PASNY's sales to the MDAs or VDPS as currently constituted.[66] Orange and Rockland notes that a recent court decision recognized that the question of whether a lease form of operation meets the requirements of the NRA has not yet been determined.[67]

PASNY argues that it did not attempt to circumvent the precedent, but actually brought a suit as early as 1983 to attempt

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(Footnote Continued)

PASNY responds that the purpose of former Chairman Dyson's report was to initiate public debate throughout the state on how preference power, a valuable state resource, should best be allocated. It states that, while MDAs may have been one result of this debate, PASNY did not control their formation.

City Service states that it was not created as an alternative to the Rural and Residential Energy Authority, and is significantly different from the Authority as it was envisioned. It argues that there was no collaboration between the MDAs and IOUs, that to the contrary, Con Edison strongly opposed providing New York City with any type of leasehold interest in its distribution system, and only agreed to the lease and operating agreement when the city threatened to institute a condemnation proceeding.

[66] 35 FERC ¶61,333 at 61,756 (1986).

[67] *PASNY v. MEUA*, 83 Civ. 6584 (JES) (S.D.N.Y. 1986).

to have this issue definitively resolved before the power was to become available in 1985.

PASNY states that it held public hearings, and that it did not need to see all the lease and operating agreements to make the allocation decisions, since the contracts for the sale of the allocated preference power to each MDA were specifically made contingent upon that MDA having suitable delivery arrangements in place so that it would be capable of selling and distributing its preference power allocation to its customers at retail. It adds that it had begun application processes and authorized hearings, but that allocation decisions had to be made quickly because of the July 1, 1985 reallocation deadline.

PASNY also states that it was appropriate for it to rely on the MDAs' and VDPS's statements that they were eligible, since reliance on a certification from the authorized legal officer that an MDA was properly formed is an appropriate action under *Vaisey v. Power Authority of the State of New York*, 120 A.D. 2d 996 (1st Dep't 1986). PASNY did, however, conduct a detailed legal review of the referenda and enabling legislation of each MDA to ensure compliance with the New York general municipal law.

City Service states that the lease and operating agreements' reference to "enabling preference power to be delivered to Con Edison's customers in the City who are eligible therefore," simply acknowledged that the City's utility would soon be serving customers who previously were solely Con Edison customers. Orange and Rockland adds that the lease and operating agreements define the term "eligible customer" to mean only those customers selected at the sole discretion of the MDAs, and that the agreements do not preclude the MDAs from designating that all preference power be received by a limited group of customers for whom such resources would be the sole source of supply.

The complainants suggest that PASNY can sell peaking interchange energy and interruptible energy to out-of-state preference customers without injuring any legitimate customer by reducing a contractual or legal entitlement. City Service responds that retroactive relief could significantly harm PASNY's retail governmental customers in southeastern New York (school districts, public hospitals, state and local government buildings, cultural institutions, etc.) that rely on these interproject transfers of economy energy to reduce their overall power costs.

B. *Prospective Relief*

The complainants state that this is the third time in seven years that PASNY has been found to have violated its license,[68] that declaratory relief alone has not been enough to stop PASNY's unlawful preference power sales, and that some greater disincentive is therefore necessary. They state that, despite the Commission's indication in Opinion No. 229-A[69] that it would be necessary to examine the details of the VDPS retail operation, not simply the enabling legislation, PASNY ruled, before the lease agreements were signed and without examining their terms, that the VDPS was a legitimate public body based only on Section 212a of the Vermont statutes. They maintain that PASNY's failure to follow Commission directives on the requirements of the NRA demonstrates that PASNY cannot be trusted to reach decisions concerning the eligibility of nontraditional claimants to preference power. Furthermore, they argue that, although it should normally be PASNY's role to make preference power eligibility decisions in the first instance, the Commission has the ultimate authority and obligation to assure PASNY's compliance with the project license and the NRA. The Commission therefore has the authority to play a more active role where necessary.

PASNY argues that the legal precedent has not been so clear, and VDPS argues that requiring prior Commission approval of sales to nontraditional public bodies would require PASNY to defend its allocation decisions even in the absence of a complaint and would constitute reintroduction of an ownership requirement.

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[68] They note that in *MEUA v. PASNY*, 21 FERC ¶61,021 (1982), 23 FERC ¶61,031 (1983), the Commission found that PASNY had failed to provide adequately for the needs of preference customers in New York and had misinterpreted the NRA, and that in *MMWEC v. PASNY*, 30 FERC ¶61,323 (1985), and 32 FERC ¶61,194 (1985), the Commission again held that PASNY had misinterpreted the NRA preference provision and had allocated preference power unlawfully to non-preference entities.

[69] 32 FERC at 61,451 n. 12.

C. *Discussion*

The ALJ appropriately used *PASNY* and Opinion Nos. 229 and 229-A as his guide in fashioning relief.[70] In *PASNY, supra,* the court stated that the Commission "... has broad discretion in determining what relief is appropriate to remedy a violation of the NRA, including in an extreme case voiding in whole or in part a contract made in violation of that Act ...," but that "... the remedy should be reasonably commensurate with the needs of the case, an 'overkill' or excessively harsh remedy may be reversed for abuse of discretion.... The purpose of the remedy is not to punish or confer a windfall on the complainant."[71] In Opinion Nos. 229 and 229-A the Commission declined to grant retroactive relief because it would be unduly punitive to reduce the allocations of customers which were not at fault. The ALJ also applied this reasoning.[72] For the same reasons, we decline to grant retroactive relief in this case.

In reference to the arguments that we consider prospective relief, we note that in the past we have left it to PASNY in the first instance to make determinations concerning allocation of preference power.[73] Our general basis for doing so has been that the Commission's prior oversight of every grant of preference power PASNY gives could become cumbersome. However, as discussed below, we are becoming increasingly concerned with the problems that have arisen.

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[70] The complainant's reference to *Chevron* is inapposite. *Chevron* did not set out a test for relief. It set out a test concerning retroactive application of new law.

[71] 743 F.2d at 112.

[72] Furthermore, although the complainants have argued that retroactive relief could be supplied without injury from peaking energy and interruptible energy, they have not sufficiently explained this position.

[73] 32 FERC at 61,451, n. 12.

As noted by complainants, PASNY has violated the terms of the NRA and its license a number of times in the past. Furthermore, we are concerned with PASNY's arguments in this proceeding that it correctly relied on state certification that the MDAs were properly formed and on the leases' general statements that delivery arrangements would be "suitable." Compliance with state law concerning formation does not establish that a company is a public body within the meaning of the NRA, and general statements do not give sufficient assurance of responsibility and control. In the future, PASNY must examine the salient characteristics of such arrangements in detail, and, for informational purposes, must file the determinations on which it has relied to conclude that the entity to which it proposes to sell preference power qualifies as a public body. If PASNY continues to violate the NRA and its license by granting preference power to entities that are not public bodies, we will consider such action to justify our taking the stronger measures which are within our broad discretion in order to ensure PASNY's compliance.

VII. Conclusions

After considering all of the arguments on exceptions, we conclude that the ALJ correctly determined the characteristics of a public body qualifying for preference power under the terms of the NRA. To qualify as a public body, an entity must provide yardstick competition, and must be directly responsible to its retail customers for the electric energy sold and delivered to them. The ALJ correctly found that yardstick competition entails competition creating a threat of takeover, entails substantially meeting the customers' energy needs, and entails providing an opportunity for rate comparison. To have direct responsibility for distribution to the retail consumer entails the possession of control of the distribution system.

We also conclude that the ALJ correctly determined that the MDAs and VDPS do not meet these criteria. The reinterpretation of the criteria which the MDAs and VDPS seek would result in the provision of preference power to what are in essence the customers of investor-owned utilities, a result which the courts have clearly stated is contrary to the intent of the NRA.

The ALJ correctly found that retroactive relief is not warranted. In addition, we find that the prospective relief requested is not warranted. Accordingly, we affirm the ALJ's initial decision. However, for informational purposes, PASNY will be required to file with the Commission the determinations on which it has relied to conclude that the entity to which it proposes to sell preference power qualifies as a public body.

The Commission orders:

(A) The initial decision issued February 16, 1988, in this proceeding is affirmed.

(B) The petition of the New York Public Service Commission to intervene is granted.

(C) The petition of the Rhode Island Attorney General and the Rhode Island Public Utilities Commission for leave to file a brief on exceptions is granted.

(D) The motions of the Municipal Electric Utilities Association of New York, the New York City Public Utility Service, and the Vermont Public Service Commission to reopen the record for an admission of a party opponent, for official notice of a Consolidated Edison rate filing, and to lodge an order of the Vermont Public Service Board, respectively, are denied.

(E) The requests for retroactive relief are denied.

(F) The request that PASNY be required to obtain the Commission's prior approval of certain of its allocations of preference power is denied.

(G) For informational purposes, PASNY must file with the Commission, at least 90 days before the effective date of an allocation of Niagara Project preference power, the determinations on which it has relied to conclude that the entity to which it proposes to sell preference power qualifies as a public body.

United States of America
Federal Energy Regulatory Commission

Municipal Electric Utilities Association of New York State v. Power Authority of the State of New York; and

Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, Docket Nos. EL 86-24-001 and EL 86-29-001

Order Denying Rehearing

(Issued October 19, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On July 28, 1989, the Commission issued Opinion No. 329,[1] which affirmed in all significant respects, the Administrative Law Judge's initial decision in this proceeding.[2] Opinion No. 329 orders the Power Authority of the State of New York (PASNY) to cease sales of Niagara project preference power to certain so-called municipal distribution agencies (MDAs) in the State of New York, and to the Vermont Department of Public Service (VDPS), on the grounds that the MDAs and the VDPS are not public bodies within the meaning of the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.*. (NRA).

Requests for rehearing were separately filed by the following petitioners: Allegheny Electric Cooperative, Inc., (Allegheny); Rhode Island Attorney General and Rhode Island Public Utilities Commission (Rhode Island); VDPS; Massachusetts Municipal Wholesale Electric Company (MMWEC) and the Connecticut Municipal Electric Energy

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[1] 48 FERC ¶61,124 (1989).

[2] 42 FERC ¶63,018 (1988).

Cooperative (CMEEC);[3] Upstate Public Utility Services Association (UPUSA);[4] New York City Public Utility Service (NYCPUS) and the County of Westchester Public Utility Agency (COWPUA); Consolidated Edison Company of New York, Inc. (Con Edison); PASNY; and Niagara Mohawk Power Corporation (Niagara). On September 22, 1989, the Commission issued an Order Granting Rehearing For Purpose Of Further Consideration.

The instant requests for rehearing raise no matters which would warrant departure from Opinion No. 329. Accordingly, the rehearing petitions are denied. However, two matters, addressed below, warrant brief discussion.

DISCUSSION

The UPUSA Motion

UPUSA requests that the Commission take official notice of contracts for delivery of preference power (Agreements) executed after the close of the record herein and an affidavit of Dennis Lerner describing certain developments after the close of record, including the allegation that due to the Commission's decision in Opinion No. 329, the St. Lawrence County MDA had ceased selling power to a particular customer, ACPC Inc. UPUSA argues that the Agreements were executed several months following the conclusion of hearings in this docket. Thus, it would have been impossible during the hearings for UPUSA to ask the Commission to take official notice of documents that did not exist at that time. The Agreements have been docketed by the Commission in cases ER88-465-000, ER88-554-000, ER88-558-000, ER88-579-000, ER89-50-000, 237-000, ER88-271-000, ER89-366-000, ER89-502-000 and ER89-258-000. The Lerner affidavit describes events after the close of the record.

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[3] On August 25, 1989, the CMEEC and MMWEC also filed a request, pursuant to Rule 212, that, *solely* as to their issue of "restitution for prior deficiencies in power allocations" (Motion, p. 1), the Commission grant their rehearing application only for purposes of further consideration, thereby effectively deferring a final Commission order resolving *that* issue. Pursuant to Rule 213, VDPS filed on September 1, 1989, in support of the CMEEC/MMWEC motion.

[4] UPUSA also filed a motion to take official notice of the developments subsequent to the close of record.

On September 11, 1989, the Municipal Electric Utilities Association of New York State (MEUA) and Allegheny jointly filed in opposition to UPUSA's motion. They contend, *inter alia*, that the Agreements UPUSA wants the Commission to take official notice of are no different from the contracts that the Commission has already considered and rejected in making the determination that UPUSA's members do not qualify as public bodies under the NRA. As for the Lerner affidavit, MEUA and Allegheny contend that since the St. Lawrence MDA was never entitled to purchase preference power in any event under Opinion No. 329, the fact that it can no longer do so adds nothing to UPUSA's case.

In Opinion No. 329 we denied a series of post record motions.[5] These motions included a motion to reopen the record by MEUA, a motion to take official notice of certain matters by NYCPUS, and a motion to lodge an order of the Vermont Public Service Board. Opinion No. 329 denied these post record motions because, *inter alia*, there must be an end to litigation. We deny the instant motion for the same reason.[6] In any event, even if we granted UPUSA's motion for official notice, this would not help UPUSA's cause. This is because Opinion No. 329 determined, among other things, that MDAs are not public bodies under the NRA and therefore they are not entitled to preference power. For that reason, the Commission on September 19, 1989, issued an order that, *inter alia*, addressed and terminated the rate schedules which are the subject of UPUSA's motion.[7]

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[5] 48 FERC ¶61,124 at 61,457-58 (1989).

[6] The wisdom of the Supreme Court in *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944) is worth noting here:

> Administrative consideration of evidence - particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it - always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearing, as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Application for Rehearing With Respect to Relief

MMWEC, CMEEC, and Allegheny all argue that the Commission erred in denying restitution for prior deficiencies in power allocation. MMWEC and CMEEC further ask that the Commission, as to the relief issue only, defer ultimate resolution on the merits pending the completion of PASNY's pending contractual review proceedings. MMWEC and CMEEC point out that a proceeding is now pending before PASNY in which each of the out-of-state "designated bargaining agencies"[8] have negotiated contracts with PASNY's negotiators. If PASNY itself approves the contracts, the contracts will be sent to the Governor of New York for his approval. On September 1, 1989, VDPS filed an answer in support of the CMEEC/MMWEC request for deferral. VDPS agrees with CMEEC/MMWEC that the relief issue on rehearing "will become moot if the Power Authority Trustees and the Governor of New York approve the proposed power contracts between the Power Authority, and the 'designated bargaining agencies' of the neighboring states, including, *inter alia*, CMEEC, MMWEC and VDPS." Answer, p. 2.

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[7] 48 FERC ¶61,314 (1989). The September 19, 1989 order did not address Long Sault, Inc.'s filing in Docket No. ER89-258-000. However, as discussed in the Commission's April 27, 1989, order accepting Long Sault's transmission agreement for transmission service to the St. Lawrence County Electric Distribution Agency (St. Lawrence EDA) for filing, 47 FERC ¶61,117 (1989), in the event St. Lawrence EDA is found ineligible to purchase preference power, St. Lawrence EDA may assign its rights in the transmission agreement to the Town of Massena, Massena Electric Department (Massena). 47 FERC at 61,348. Massena is a public body under the NRA and has purchased power from PASNY since 1981. In these circumstances the Commission properly refused to terminate Long Sault's agreement in the September 19, 1989, order. It appears that there has been a *de facto* assignment by St. Lawrence EDA to Massena. *See* MEUA/Allegheny answer, September 11, 1989 affidavit of Clifford G. Engstrom.

[8] 16 U.S.C. §836(b)(2).

Although the relief issue is one with which the Commission is "becoming increasingly concerned,"[9] we have already concluded that retroactive relief should not be granted in this case. The possibility that the relief issue could be mooted by mutual resolution of the above parties does not convince us to leave the issue pending. The request to defer ultimate action on the issue therefore is denied.

The Commission orders:

(A) The rehearing requests are hereby denied.

(B) The UPUSA motion to take official notice of developments subsequent to the close of the record is hereby denied.

(C) The requests for stay of Opinion No. 329, filed by the Vermont Department of Public Service on August 10, 1989, and the Upstate Public Utility Service Association on August 14, 1989, are hereby denied.

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[9] Opinion No. 329, 48 FERC at 61,478.

United States Court of Appeals For The Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of February, one thousand nine hundred and ninety-one.

ALLEGHENY ELECTRIC, ET AL.,

- V.-

FEDERAL ENERGY REGULATORY COMMISSION

DOCKET NUMBER
89 -4125,
90 -4067,
-4069-4071,
-4073-4075,
-4077-4079

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Petitioner VERMONT DEPARTMENT OF PUBLIC SERVICE.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

NIAGARA POWER PROJECT

Sec.

836. Authorization to license construction and operation; licensing conditions.

836a. Rules governing issuance of license.

§ 836. *Authorization to license construction and operation; licensing conditions*

(a) The Federal Energy Regulatory Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Energy Regulatory Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act [16 U.S.C. 791a et seq.], the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) of this subsection available for use within reasonable economic transmission distance in neighboring States, but this paragraph

shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such State shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Energy Regulatory Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchase power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Energy Regulatory Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the

licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Energy Regulatory Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

(Pub. L. 85-159, § 1, Aug. 21, 1957, 71 Stat. 401; Pub. L. 95-91, title IV, § 402(a)(1)(A), Aug. 4, 1977, 91 Stat. 583.)

③ ② ② ②

Nos. 90-1721, 90-1725, 90-1760, 90-1949

Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
JAMES E. O'NEIL, ATTORNEY GENERAL OF THE
STATE OF RHODE ISLAND AND THE RHODE ISLAND
PUBLIC UTILITIES COMMISSION,
Cross Petitioners,
v.
NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT
DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF
WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court below acted properly in affirming the Federal Energy Regulatory Commission's determination of the criteria which must be met in order to be a "public body" under the Niagara Redevelopment Act and its determination that petitioners did not qualify to purchase Niagara Redevelopment Act preference power?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc. ("Allegheny"), the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), the Municipal Electric Utilities Association of New York State ("MEUA") and the Public Power Association of New Jersey ("PPANJ") (collectively referred to herein as "Public Systems"), all intervenors in the court below, respectfully pray that the Court deny the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949.

STATEMENT OF THE CASE

This case presents for consideration the third recent and related appeal of a Federal Energy Regulatory Commission ("FERC" or "Commission") decision concerning the allocation of Niagara Project hydroelectric power under the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.* ("NRA").[1] Less than five years ago, this Court denied multiple petitions for writs of certiorari in *MTA*. The petitions filed here present nothing that has not previously been submitted to this Court. They should also be denied.

The Court's evaluation of the petitions will be greatly aided by a brief overview of the NRA and recent litigation concerning its meaning. The NRA directed the Federal Power Commission (now the FERC) to issue a license to the Power Authority of the State of New York ("PASNY") under Part I of the Federal Power Act, 16 U.S.C. § 791 *et seq.* The license permitted PASNY to construct and operate a hydroelectric power project on the Niagara River, between New York and Canada.

The NRA also directed the Commission to include a "preference" clause in the license, which states that:

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[1] The other two cases are: *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*") and *Metropolitan Transp. Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Elec. Coop., Inc. v.* FERC, 479 U.S. 1085 (1987) ("*MTA*").

> [T]he licensee in disposing of 50 per centum of the project power *shall give preference and priority to public bodies* and nonprofit co-operatives within economic transmission distance.

16 U.S.C. § 836(b)(1) (emphasis added). This clause, the meaning of which was litigated in *PASNY* and *MTA*, was explained in the opinion under consideration here:

> The fifty percent of Niagara Project power set aside for "public bodies and nonprofit co-operatives" is referred to as preference power. Those entities eligible to receive an allocation of this preference power are called preference customers. To be a "preference customer", an entity first must qualify as a "public body".

Allegheny Electric Cooperative, Inc. v. FERC, 922 F.2d 73, 76-77 (2d Cir. 1990) ("*Allegheny v. FERC*"), P.A. at 5-6.[2] The three petitioners and the cross-petitioner herein all claim that they are NRA "public bodies," and are thereby entitled to preference power allocations.

A. *Prior Cases.* Litigation over the NRA's phrase "public bodies" began several years ago. In the 1984 *PASNY* decision, the Second Circuit affirmed the Commission's determination that an NRA "public body" must, *inter alia*, be the type of entity which fosters "yardstick competition," described in its simplest form as competition by example. *PASNY*, 743 F.2d at 105. The FERC and the court also ruled that NRA "public bodies" are only those publicly-owned entities that sell and distribute preference power directly to consumers. *MEUA v. PASNY*, Opinion No. 151, 21 FERC (CCH) ¶ 61,021 at pp. 61,105-11, 61,129 (1982). In affirming the Commission, the Second Circuit conducted its own analysis of the NRA's legislative history, and also accorded " 'great deference' " to the Commission's conclusions, because they came from the "agency charged with [the NRA's] administration." *PASNY*, 743 F.2d at 103, 105 (citations omitted).

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[2] References to the decisions of the Commission and the court below included in the "Appendix to Petitions For Writ of Certiorari" are designated as "P.A.".

In *MTA*, the FERC and the Second Circuit considered whether New York's Metropolitan Transportation Authority ("MTA") and the Vermont Department of Public Service ("VDPS") were "public bodies." The FERC concluded that the MTA and VDPS were not NRA "public bodies," because neither was capable of selling and distributing power directly to consumers at retail. *MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC (CCH) ¶ 61,323, at p. 61,651 (1985). The Second Circuit again affirmed the FERC's determinations. *MTA*, 796 F.2d at 590, *quoting* Opinion No. 229, 30 FERC at 61,651. In so concluding, the court again reviewed the NRA's legislative history, stating:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that is what Congress intended the term to mean.

Id. at 591. This Court then denied two petitions for writs of certiorari and a cross-petition filed by the State of Rhode Island. 479 U.S. 1085 (1987).[3] But for the change in certain parties, *MTA* might well be said to collaterally estop relitigation of the issues presented by petitioners here.

B. *The Present Case.* This case stems from PASNY's 1985 decision to allocate preference power to numerous so-called "Municipal Distribution Agencies" ("MDAs"),[4] including petitioners County of Westchester Public Utility Service Agency ("COWPUSA") and New York City Public Utility Service ("NYCPUS"), and to the revised VDPS.[5] Both the MDAs and VDPS sought to satisfy the NRA "public body" criteria of *MTA* and *PASNY* by entering into arrangements under which petitioners purported to serve "their" customers by purporting to "lease" electric distribution facilities from allegedly competing local investor-owned utilities. These leases provided that the private utilities would continue to perform all distribution and billing functions. Public Systems challenged PASNY's allocation decisions at FERC, contending that neither the MDAs nor VDPS constituted "public bodies."

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[3] Two of the petitions, filed by the MTA, No. 86-736, and by the State of Rhode Island, No. 86-942, challenged FERC's ruling on the nature of the NRA's "preference" clause and the definition of the term "public bodies". Rhode Island's 1986 cross-petition raised many of the issues raised again here. Petitioner Allegheny sought review only of the FERC's interpretation of the NRA term "neighboring states."

The State of Rhode Island's current cross-petition is similar in at least one respect to its 1986 cross-petition: it is based on an exceedingly limited participation in the case at the Commission. Rhode Island did not seek to participate in the hearing underlying Opinion No. 329, and was only granted intervention in that decision itself. P.A. at 68-69.

[4] The term "MDA" refers to paper agencies created in counties and cities in New York State, with the unusual assistance of New York's investor-owned utilities, the MDAs' alleged competitors, to serve as conduits for the delivery of NRA preference power to customers of investor-owned utilities.

[5] As explained in *Allegheny v. FERC* (P.A. at 8), following the issuance of Opinion No. 229, VDPS was the subject of state legislation "aimed at satisfying the Commission's 'public body' definition" in *MTA* and *PASNY*.

In *MEUA v. PASNY*, Opinion No. 329, 48 FERC (CCH) ¶ 61,124 (1989), the Commission explained that the MDA and VDPS "lease" arrangements had several pertinent common features. In the case of the MDAs, the Commission found that the investor-owned utility "lessor":

> (1) . . . retains the franchise responsibility to supply the full requirements of its customers for electric service; (2) the IOU [investor-owned utility] remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU; (3) the IOU has exclusive control of its entire system, leaving no room for assertion by the MDAs of control over distribution facilities; (4) the IOU may suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted

> against the IOU; and (5) the IOU issues the bills, which do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power, thus giving no opportunity to compare the quality of service or price.

P.A. 94-95. With regard to VDPS, the Commission confirmed (P.A. 100-101) the conclusions of its Administrative Law Judge ("ALJ") that, despite the "leases," VDPS: (1) had no direct responsibility for retail electric distribution, "since under the lease and operating agreements and the service contracts the [lessor] utilities perform all the utility functions"; (2) had no control of the "lessor's" distribution system; (3) could not foster competition because VDPS's "costs of operations are basically those of the utility"; and (4) could only "serve" customers who were also customers of the privately-owned utility "lessor". Initial Decision, P.A. 60-61.[6] On the basis of these factual findings, the Commission determined that neither the MDAs nor VDPS qualified as an NRA "public body," because they were not selling and distributing preference power directly at retail.

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[6] VDPS, citing Appendix page 60, states that the ALJ "concluded that [VDPS] . . . has the ability to provide its service to virtually any resident of Vermont upon request." VDPS's selective quotation is misleading. In fact, the Judge qualified the cited "conclu[sion]" as follows:

> While VDPS will supply electricity to any resident on request, one condition exists, the resident must also be a customer of the privately owned utility. Otherwise, power is not available. Thus, there is no real competition for new customers.

P.A. at 60. In other words, VDPS could not "provide its service to virtually any resident" unless the resident was in fact served by the local investor-owned utility. The result is that the retail customer has no choice of electric suppliers, and the only distributor is the investor-owned utility, not the alleged public body.

The FERC, in Opinion No. 329, also refined the "yardstick competition" standard it had developed in the prior cases, holding that an NRA "public body" must provide such competition by: (a) being the type of entity which can threaten to take over or displace the private utility; (b) substantially meeting the energy needs of *its* customers, and (c) providing a basis for comparison with investor-owned utility rates and service. A "public body" must be directly responsible for serving its retail consumers, and must control its distribution system. Opinion No. 329, P.A. at 87-89, 94.[7]

The Commission determined that VDPS and the MDAs did not meet any of these criteria, as they could not pose any competitive threat to investor-owned utilities. The Commission concluded that under the "lease" arrangements, investor-owned utility customers receive low-cost NRA "preference" power without having to create a publicly-owned power system, rendering petitioners nothing more than paper conduits for that power. As explained by the FERC:

> [T]he MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has

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[7] *See also Allegheny*, 922 F.2d at 79, P.A. at 9-10; *MEUA v. PASNY*, Initial Decision, 42 FERC (CCH) ¶ 63,018 (1988), P.A. 40-42, 54-61.

> been repeatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

On appeal, the Second Circuit affirmed the Commission's criteria and the FERC's application of the criteria to the MDAs and VDPS, emphasizing, as in *PASNY*, that "FERC is the agency that is responsible for administering the NRA," and that on questions of statutory interpretation, " 'great deference' must be accorded 'to the interpretation given the statute by the officers or agency charged with its administration.' " *Allegheny*, 922 F.2d at 80, P.A. at 12, *quoting PASNY*, 743 F.2d at 103, *quoting Connecticut Fund for Environment, Inc. v. EPA*, 696 F.2d 169, 173 (2d Cir. 1982).

REASONS FOR DENIAL OF THE WRIT

The petitions and cross-petition should be denied because they do no more than rehash arguments raised and rejected numerous times. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. The case involves a federal statute, but presents no major federal or constitutional question. In essence, this case concerns nothing more than an interpretation of a statute by the agency charged with its administration, and a decision by an appellate court that the agency's interpretation was a reasonable one.

1. Petitioners argue that Court review is warranted because of several alleged errors in the lower court's application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Specifically, petitioners argue that the court below

improperly deferred to the FERC where: (1) the Commission's ruling was itself based upon an erroneous reading of *MTA* (VDPS Petition at 13-15; NYCPUS Petition at 12-14);[8] (2) deference should have been accorded to PASNY (which had found that the MDAs and VDPS were NRA "public bodies"), not the FERC (VDPS Petition at 15-16; COWPUSA Petition at 27-28); and (3) the Commission's interpretation of the NRA "has changed several times". VDPS Petition at 10.

The lower court's application of the *Chevron* doctrine was appropriate. *Chevron* describes a two-step analysis to be applied when a court is faced with review of an agency's "construction of the statute which it administers":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

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[8] It is noteworthy that cross-petitioner Rhode Island raised this same argument in its 1986 cross-petition for a writ of certiorari, which this Court denied. *See* No. 86-942, Cross Petition at 21-26; *cert. denied*, 479 U.S. 1085 (1987).

467 U.S. at 842-43 (footnotes omitted). Thus, the Second Circuit first determined that the term "public body" is "not defined in the NRA," and that, therefore, it was appropriate to review the Commission's interpretation of the term. *Allegheny v. FERC*, 922 F.2d at 81, P.A. at 14. Following this Court's *Chevron* analysis, the Second Circuit then found the Commission's three-part criteria to be "reasonable":

> Although we might not have adopted these exact criteria had we analyzed these issues in the first instance, the Commission's construction of the statutory term "public bodies" is not so unreasonable as to amount to an arbitrary and capricious action. In reviewing the Commission's construction, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, (citations omitted).

922 F.2d at 82, P.A. at 16-17. Notwithstanding the court's use of the subjunctive "might" rather than "would" (as VDPS would have it), the Second Circuit cited no instance in which its views differed from those of the Commission, stating instead its agreement with the Commission's "control" criterion. *Id.* at 84 P.A. at 20.[9]

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[9] Undaunted, VDPS claims that it has "been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, *the Second Circuit disagrees*, but nonetheless concludes that affirmance is compelled

VDPS, joined by NYCPUS, argues that the court erred in that the Commission was entitled to no *Chevron* deference because it had wrongly found that the "key determinant of public body status," "complete operational control of distribution facilities," originated in the Second Circuit's *MTA* decision. VDPS argued:

> *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a)(emphasis added).

Petition at 13; *see also* NYCPUS Petition at 13. VDPS goes on to argue that because *MTA* did not address the "control" issue, the Commission could not properly rely upon the decision as the basis for the "control" criterion.

The contention that the Commission, in determining that distribution system control was a "public body" criterion, incorrectly believed itself bound by *MTA*, is not supported by an accurate, complete quotation of the language of the FERC decisions in this proceeding. The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a "public body" control a distribution system; instead, the Commission stated that "the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution." Opinion No. 329, P.A. at 86 (emphasis added). The FERC's reliance then was not on *MTA*, but on the

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under *Chevron*" (Petition at 15, emphasis added). VDPS cites no support for the contention that the "Second Circuit disagrees," and the content of the court's opinion is to the contrary.

legislative history discussed in *MTA*. Shortly thereafter, the FERC stated:

> The ALJ correctly found that to "sell and distribute power directly to consumers of electricity at retail" requires direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity must have control over its distribution system.

Opinion No. 329, P.A. at 88 (footnote omitted).

Thus, the Commission's control criterion was based upon its own interpretation of: (a) NRA legislative history (discussed in *MTA*); and (b) the "sell and distribute directly" standard, which was developed by the FERC in Opinion Nos. 229 and 229-A (MMWEC and CMEEC v. PASNY, 32 FERC (CCH) ¶ 61,194 (1985)), and affirmed in *MTA* (and which this Court chose not to review). Thus, the VDPS-NYCPUS "circle of deference" argument, the linchpin of the two petitions, collapses.

Moreover, support for VDPS's claim that the control criterion was the "key determinant" of "public body status under FERC Opinion No. 329" is nowhere to be found in either the Commission or court decisions. This contention appears to be part of a strategy to disregard or finesse another of the Commission's "public body" criteria, *i.e.* that preference power purchasers must be "directly responsible" for the retail distribution of electricity directly to customers.[10] Petitioners obviously cannot meet this criterion because they have assumed *no* utility responsibilities. Instead, VDPS attempts to sweep the "direct responsibility" criterion within its erroneous claims about "control." Thus, VDPS argues that "control" and "direct responsibility" are treated "interchangeably" in the FERC and court orders, and then tries to mount another "circle of deference" claim, stating that the

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[10] For example, in reviewing the ALJ's decision, VDPS states that the Judge's determination that VDPS did not qualify as an

> [D]irect responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities.

VDPS Petition at 23 n. 17.

The "direct responsibility" criterion is not "derive[d] from FERC's interpretation" of *MTA*, but is instead based on the FERC's own determination in Opinion Nos. 229 and 229-A (affirmed in *MTA*) that an NRA "public body" must be capable of direct retail distribution and cannot "arrange" for such distribution.[11] The statement that "FERC concluded that to

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NRA "public body" relies "principally" on "his control criterion." The cited pages of the decision (Initial Decision, P.A. at 60-61), in which the ALJ evaluates VDPS against the yardstick competition, direct responsibility and control criteria, do not support VDPS's assertion.

[11] As stated by the FERC in Opinion No. 229, the "requirement for direct responsibility is established by court and Com-

be directly responsible *MTA* requires control" is not accompanied by any citation and, as demonstrated above, is contrary to the language of the FERC opinion. Opinion No. 329, P.A. at 881.

It bears noting that just as the Commission did not blindly rely upon *MTA*, neither did the Second Circuit blindly defer to the FERC. The court stated that it "agree[s] with the Commission that the exercise of such control [over distribution] is essential to a finding of 'public body' status." *Allegheny*, 922 F.2d at 84, P.A. at 20. Thus, there was no abdication on the part of either the Commission or the court of their respective duties to evaluate independently the appropriate NRA "public body" criterion.[12]

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mission precedent which refer to 'direct' distribution to the retail customer." P.A. at 83 n.36 (citations omitted).

[12] In general, VDPS seems confused about who -- as between FERC and the Second Circuit -- decided what. Thus, VDPS states that

> [I]n adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a).

VDPS Petition at 7. Opinion No. 329 contains no statement, at page 86 or anywhere else, that in affirming the ALJ's criteria, FERC was "merely following . . . *MTA*." Moreover, VDPS's quote of the Second Circuit holding fails to note that the court itself was quoting -- and affirming -- the Commission's determination in Opinion Nos. 229 and 229-A. *MTA*, 796 F.2d at 593 ("[w]e therefore affirm FERC's conclusion that the term 'public bodies' . . . means 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity

As a fallback position, VDPS argues that the lower court also erred in that Opinion No. 329 conflicts with the "plain purpose" of the NRA. Petition at 21. That "purpose," which VDPS contends it fulfills, is to "promote 'yardstick competition' between public bodies and private utilities. *MTA*, 796 F.2d at 593." Petition at 19.[13]

The Commission explained why VDPS could neither promote such competition, nor fulfill the statutory objective:

> [S]ince VDPS leases its distribution facilities from the IOUs [investor-owned utilities], and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus, no benchmark is possible, and VDPS does not foster yardstick competition.

Opinion No. 329, P.A. at 101.

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at retail' "). Once again, VDPS's "circle of deference" argument relies upon a misrepresentation of the agency and judicial decisions below.

[13] It is also noteworthy (though hardly surprising) that in making this argument VDPS again changes the words of the Second Circuit. The court in *MTA*, 796 F.2d at 592, 593 referred to the fostering of yardstick competition between "private utilities" and either "publicly-owned" or "municipal utilities," not "public bodies." Nonetheless, VDPS repeatedly (Petition at 19, 20 and 24) refers to "public bodies," not "municipal utilities," the phrase used by the court in *MTA*. VDPS's purpose in presenting this misstatement is obvious: yardstick competition requires, first and foremost, a publicly-owned "utility," not merely a public agency authorized to enter into "lease" arrangements which convey no substantive rights.

The Second Circuit endorsed this analysis:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the objective of the NRA, it is difficult to see how the leasing arrangements at issue advance that fundamental objective.

Allegheny, 922 F.2d at 85, P.A. at 21.[14]

Petitioner COWPUSA raises here for the first time in this proceeding the claims that the Second Circuit used "legislative history" to add a "concept, 'yardstick competition,' which has no basis in law or economics and which contradicts the express purposes and intent of the statute" (COWPUSA Petition at i). Cross-petitioner Rhode Island asks the Court to "rein in" the use of legislative history. Rhode Island Cross-Petition at 7-10. These arguments do no more than betray COWPUSA's and Rhode Island's desperation. The same COWPUSA joined in a brief before the Second Circuit which states that the MDAs "provide yardstick competition as envisioned by Congress."[15]

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[14] VDPS argues (Petition at 23) that in this quote the Second Circuit was stating that the absence of distribution cost competition was the " 'most compelling' rationale cited by FERC for the imposition of an operational control requirement." The quote clearly refers to competition, not control. VDPS's characterization is wrong; the reason for its mischaracterization is transparent.

[15] "Joint Brief of MDAs and Supplemental Brief of VDPS," dated July 19, 1990, at page 20.

COWPUSA's attempt now to raise matters not raised below or even contrary to those it raised below should be rejected. *See McCullough v. Kammerer Corporation, et al.*, 323 U.S. 327, 328 (citing cases) (1945).[16]

Finally, cross-petitioner Rhode Island attempts to disown the purpose of the NRA by claiming that the " 'yardstick competition' " concept was the result of "judicial exaltation" and "was not even undisputedly accepted in the legislative history." Rhode Island Cross-Petition at 6-7. In 1984 in *PASNY*, the Second Circuit addressed this issue directly and found that the NRA preference clause was "founded" on the "yardstick competition" concept. *PASNY*, 743 F.2d at 105; *see also MTA*, 796 F.2d at 591-92. It is far too late for Rhode Island to claim that "yardstick competition" is irrelevant. In fact, Rhode Island similarly argued in 1986 that the Commission and Second Circuit had misread the legislative history. No. 86-942, Cross-Petition at 17-21. The argument has no more substantive appeal now than it did five years ago.

2. VDPS and NYCPUS contend that the Second Circuit ruling conflicts with decisions of the D.C. Circuit (VDPS Petition at 10-11; NYCPUS Petition at 13), and argue that the decision will have

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[16] Similarly, COWPUSA argues that the application of the FERC's public body criteria "intermeddl[es]" in "matters fundamentally of state and local concern." (COWPUSA Petition at 31). Instead, COWPUSA argues, state law should be used in setting "public body" standards. *Id.* This argument was not raised below, was rejected in *PASNY*, 743 F.2d at 104-105 (rejecting claim that NRA preference clause must be squared with New York law), and, therefore, constitutes no basis for the granting of a writ of certiorari.

"[p]recedential [r]amifications" for the interpretation of other "federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies" (VDPS Petition at 11-12; NYCPUS Petition at 8). The Second Circuit's decision does not conflict with rulings in other circuits. VDPS and NYCPUS compare the decision below with the District of Columbia Circuit's refusal to defer to agency findings where those holdings were based on "an erroneous view of the law."[17] The cited cases are irrelevant, for the Second Circuit did not rule that an erroneous Commission interpretation of the NRA is nonetheless entitled to deference. Instead, the court found the Commission's interpretation of the NRA to be reasonable and consistent with the court's own precedents.[18]

3. VDPS contends (Petition at 15-16) that deference should have been accorded to PASNY, not the FERC. This contention was not raised before either the Second Circuit or the FERC. As such, it should not form the basis for granting a writ of certiorari. *McCullough v. Kammerer Corporation, et al*, 323 U.S. at 328.

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[17] VDPS Petition at 10-11, citing, *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir.), *cert. denied sub nom.*, *Meyers Industries v. Prill*, 474 U.S. 948 (1985). *See also International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986). NYCPUS Petition at 13-14.

[18] Moreover, the D.C. Circuit's rulings in the cited cases depend heavily on the subject agencies' failure adequately to explain the bases for their results, failures very much at odds with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *See Phillips*, 729 F.2d at 1167, 1169-71; *Prill*, 755 F.2d at 947-48, 956.

In any event, the argument has no merit. It is well-settled that the FERC, not a licensee (such as PASNY) has the authority to interpret and enforce license terms. *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 396-7 (2d Cir. 1980), *cert. denied sub nom., Penn Yan v. New York State Electric & Gas Corp.*, 454 U.S. 821 (1981). The fact that this case involves *Commission* enforcement of an article in PASNY's *Commission* license (and enforcement of a provision in the NRA) puts it in sharp contrast to the genuinely shared jurisdiction at issue in *Secretary of Labor v. Occupational Safety and Health Review Commission*, 111 S.Ct. 1171 (1991), relied on by VDPS. Moreover, the Commission has previously rejected the notion that "[d]eference, if any, belonged to PASNY, not FERC" (VDPS Petition at 15). The FERC, in Opinion No. 151, noted that it had authority to enforce the NRA license terms since "Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." *MEUA v. PASNY*, 21 FERC at p. 61,126. *See also MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC at p. 61,644 (Commission need not defer to PASNY but may conduct *de novo* review). Thus, prior precedents dispose of the VDPS argument that PASNY, not the FERC, should be given deference.

4. VDPS, relying on the 1976 decision in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109 (1976) ("*VPSB*"), contends that deferral is improper because the Commission "several times" changed its position on VDPS's status as a "public body". VDPS Petition at 10, 16-17.

VDPS overstates the significance of *VPSB*, arguing that the Commission "explicitly held [in *VPSB*] that VDPS [the successor agency to the Vermont Public Service Board ("VPSB")] was a 'public body'. . . ." Petition at 17. In fact, the 1976 statements concerning VPSB's "public body" status were mere dictum.[19] The *VPSB* dictum was "reversed" in Opinion No. 229, and confirmed in Opinion No. 329. Thus, the alleged change in position occurred at most once, not "several" times, and any change was specifically addressed and explained in Opinion Nos. 229 and 229-A, and affirmed in *MTA*, as to which this Court denied certiorari. VDPS participated fully in those proceedings, but did not challenge before the Second Circuit the *VDPS* reversal. The court below was correct in granting "full" deference to the Commission.

Moreover, the *Chevron* deference doctrine is based on congressional delegation of authority to an agency, not on a need for finality in agency decisionmaking. 467 U.S. at 843-44. As explained in *Chevron*, in analyzing a new agency interpretation of the term "source":

> The fact that the agency has from time to time changed its interpretation of the term "source" does not . . . lead us to conclude

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[19] In *VPSB*, a dispute between Allegheny and VPSB over thirty megawatts of Niagara preference power, the Commission affirmed PASNY's determination that Allegheny should receive all of the disputed thirty megawatts. However, responding to an argument by Allegheny that VPSB did not qualify as a "public body" under the NRA because it resold preference power to investor-owned utilities, the Commission, *in a statement unnecessary to the outcome of the case*, indicated that VPSB did so qualify. 55 FPC at 1113.

> that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. *See also In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (administrative authorities may deal with changed circumstances).[20]

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), relied on by VDPS, is not to the contrary. In *INS*, the Court applied the first step of the *Chevron* analysis, ruling that the meaning of the statute at issue was clear, thereby eliminating the need for *Chevron* deference. Moreover, the Court noted that the agency was inconsistent in its own reading of the statute, even to the extent of having already abandoned the very position for which it sought affirmation on the basis of *Chevron* deference, thus discounting the need to defer to the agency. *Id.* at 446, n.30.

5. VDPS (Petition at 12), joined by NYCPUS (Petition at 8), argues that the Second Circuit's ruling "would have substantial precedential impact" in part because the Tenth Circuit recently decided a case involving the meaning of a preference provision in an-

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[20] Other cases from this Court have emphasized the continuing validity of the *Chevron* deference standards quoted above. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-54 (1987) (Scalia, J. concurring); *NLRB v, United Food and Com'l Workers* Union, 484 U.S. 112, 133, (1987) (Scalia, J., concurring, emphasizes continuing validity of *Chevron* in light of "dicta" in *INS*).

other statute. *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) ("*Salt Lake*"). Both petitioners ignore that the Second and Tenth Circuit rulings are consistent, rendering review by this Court unnecessary.

The issue in *Salt Lake* was very similar to the "public body" question here, the only distinction being that the language in the applicable provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), grants a preference in hydroelectric power sales to "municipalities," a more specific term than "public bodies." The Western Area Power Administration ("WAPA"), interpreted "municipality" to mean a municipality that operated its own utility system, *i.e.*, one with "utility responsibility." The Tenth Circuit, applying *Chevron*, deferred to the agency's definition of "municipality," rejecting appellant's notion that the Oxford English Dictionary provided a sufficiently clear meaning. *Salt Lake*, 926 F.2d at 978, quoting *Chevron*, 467 U.S. at 844, quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961). The WAPA and Tenth Circuit emphasis on "utility responsibility" is in accord with the FERC and Second Circuit criteria for "public body" status—"direct responsibility" and "control" are the very crux of "utility responsibility."

Given the complete consistency between the Second Circuit and Tenth Circuit decisions, even as to their dual reliance on *Chevron*, petitioners are forced to rely on the dissent in the *Salt Lake* case. VDPS Petition at 12, n.10. A dissenting opinion hardly establishes a conflict between circuits meriting this Court's review.

6. VDPS's final argument is that the "control" criterion is "not the product of reasoned decisionmak-

ing" (Petition at 22).[21] In essence, VDPS claims that an NRA "public body" need not be responsible for the provision of any utility services, for the delivery of any specific amount of power, or for the control of any distribution facilities.

The requirements that NRA "public bodies" be directly responsible for consumer needs, and control the distribution facilities used to deliver the power to meet those needs, flow directly from the Commission's prior and judicially-affirmed holding that NRA "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers at retail," *not* consumers or brokers. *MTA v. FERC*, 796 F.2d at 595, *cert. denied*, 479 U.S. 1085, *citing with approval*, Opinion No. 229, 30 FERC at p. 61,651; *see also* 32 FERC at p. 61,445 (emphasis in original). The FERC had elaborated on this point in Opinion No. 229-A, stating, with regard to VDPS, that

> Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party *directly responsible* for the needs of the consumers served.

32 FERC at p. 61,444 (emphasis added). Thus, the FERC stated that "control is relevant not merely to the ability to meet customers' requirements but to

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[21] VDPS ignores FERC's requirement that a public body be "directly responsible" for the needs of its customers, arguing instead that "control" and "direct responsibility" are the same thing. (Petition at 23 n. 17). VDPS, by calling "responsibility" "control," cannot finesse the indisputable fact that neither VDPS nor the MDAs have any responsibilities to customers. Opinion No. 329, P.A. at 94-97.

doing so directly. . . ." Opinion No. 329, P.A. at 83 n.36.

First, VDPS argues that "yardstick competition comes from a comparison of rates, not the individual cost components thereof". Petition at 24. VDPS is wrong. "Yardstick competition" comes from the presence of publicly and privately-owned competitors, *i.e.*, real distribution utilities which control their own distribution (and other) costs, which constitute more than an allocated share of someone else's costs. Such entities foster, rather than eliminate, yardstick competition between municipal utilities and investor-owned utilities.

Second, VDPS wrongly claims that no lessee will be able to meet the "control" standard. Petition at 24-25. FERC case law reveals many instances—in the context of both electric and gas utilities—in which lessees have gained precisely the sort of operational (and, therefore, cost) control which VDPS claims is unavailable to petitioner "lessees." By the same token, the Commission has been unwilling to find that merely possessing legal title to, or a leasehold interest in, electric facilities makes the entity a jurisdictional "public utility."[22]

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[22] *See e.g., Citizens Power and Light Corp.*, 48 FERC (CCH) ¶ 61,210 (1989); *Fort Howard Corp.*, 48 FERC (CCH) ¶ 61,303 (1989); *Hennepin Energy Resources Co.*, 48 FERC (CCH) ¶ 62,224 (1989); *Niagara Mohawk Power Corp.*, 37 FERC (CCH) ¶ 61,081 (1986); *El Paso Electric Co.*, 36 FERC (CCH) ¶ 61,055 (1986); *Portland General Electric Co.*, 33 FERC (CCH) ¶ 61,459 (1985); *United Illuminating Co.*, 29 FERC (CCH) ¶ 61,270 (1984); *Public Service Company of New Mexico*, 29 FERC (CCH) ¶ 61,387 (1984); *Pacific Power and Light Co.*, 3 FERC (CCH) ¶ 61,119

Third, VDPS' claim (Petition at 25) that the Commission has *sub silentio* reversed its NRA "public body" determination in two unrelated *Central Vermont Public Service Corporation* orders (Petition at 25 & n.20) is erroneous. In the second of those orders, 53 FERC (CCH) ¶ 61,204 (1990), after having been alerted that VDPS was relying on the FERC's mere repetition of VDPS's self-description in the Second Circuit, the Commission stated expressly that

> [I]ts findings in this proceeding were not intended to reflect on or in any way modify its findings regarding [VDPS's] status for purposes of the issues addressed in Opinion No. 329. [VDPS] can best be described as a broker acting in both the wholesale and retail markets in the State of Vermont.

Id. at 61,818.[23]

Fourth, VDPS claims this criterion is "subject to a number of irreconcilable conflicts." Petition at 26. These "conflicts" do not exist and therefore do not merit Court review. VDPS first cites (Petition at 26) the FERC's recognition that, on occasion, an indus-

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(1978).

The same distinction has been applied with respect to natural gas utilities. *See American Louisiana Pipe Line Company, et al.*, 30 FPC 1211, 1212 (1963); *El Paso Natural* Gas Company, 19 FPC 371, 372 (1958).

[23] The Commission went on to note that a statement in the first *Central Vermont* order (52 FERC (CCH) ¶ 61,278 (1990)) concerning the Department's status as a retail competitor was "from the background section of the order, . . . and was not an assertion of the Commission's position. . . ." 53 FERC at 61,818, n.9.

trial customer is served by more than one supplier (*e.g.*, when the industrial customer serves itself by generating part of the power it needs). This statement is not an admission that an NRA "public body" need not control distribution facilities (or assume utility responsibilities).

VDPS then alleges an exception concerning "borderline agreements," which are inter-*utility* agreements under which a customer located on the "border" of a utility's service territory is for practical reasons actually served using the facilities of a second utility. The Commission determined that such agreements do not violate the control requirement because both companies to a borderline contract "still control their own distribution systems and bill *their own customers*." Opinion No. 329, P.A. at 89 (emphasis supplied). Moreover, even under a borderline agreement, the utility not operating the facilities—unlike VDPS and the MDAs—retains responsibility for ensuring that service is received and that load growth needs are met.

VDPS also contends that the FERC did not "reconcile why its control criterion applies only to distribution facilities". Petition at 26. In fact, the Commission stated (Opinion No. 329, P.A. at 89) that the focus of the NRA was on distribution, not transmission, a concept endorsed by the court in *MTA*, 796 F.2d at 592, and found to be consistent with other federal preference laws. *Id.* at 592 & n.7.[24]

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[24] In so arguing, VDPS, citing the ALJ and the lower court (P.A. at 10 and 44), inaccurately identifies " 'continuity of service' " as the "Commission's justification for the" control criterion (Petition at 26-27). VDPS has left out most of the multiple

Fifth, VDPS (joined by NYCPUS, Petition at 9-10) states that competition does not require control, citing cases in the natural gas and telecommunications industry, and that FERC failed to consider this argument. In fact, FERC recognized this argument, but rejected it:

> It is true that one need not own generation, transmission and distribution facilities to engage in the utility business. However, engaging in the utility business does not qualify an entity to receive preference power under the NRA.

P.A. at 89. In the same vein, it bears repeating that the Commission concluded that:

> In contending that they should be considered innovative alternative public bodies, and in their attacks upon the ALJ's yardstick and direct responsibility criteria, the MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has been re-

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justifications for the control criterion. As stated by the ALJ:

> The authority to fix rates and conditions of service must include the power to employ cost cutting measures in distribution as well as the ability to ensure the continuity of service. Only if an entity has all of these attributes does it satisfy this criterion.

Initial Decision, P.A. at 44. The reference to the opinion in *Allegheny v. FERC*, 922 F.2d at 79, P.A. at 10, is the portion of the lower court's decision in which it recites the findings of the ALJ.

> peatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

7. COWPUSA and Rhode Island, again revealing the apparent futility of their position, claim that the FERC's public body and "yardstick competition" standards "intermeddl[e] with matters fundamentally of state and local concern," COWPUSA petition at 31, and "offend [ ]. . .principles of federalism." Rhode Island petition at 14. This is nonsense. Their position is nothing less than an attack on the constitutionality of the Federal Power Act, which after all authorizes the Commission to issue licenses "to any State or municipality" and makes it unlawful for any "State, or municipality" to construct a hydroelectric project on navigable waters without a Commission license. 16 U.S.C. §§ 797(e), 817. COWPUSA's and Rhode Island's petitions are also the first time in this case that such a broadside attack has been levied on the FERC's licensing authority. They did not raise this issue below.

As explained above, however, the FERC's authority to enforce the Commission-issued license and the NRA against state agencies was an issue in the case leading up to Opinion 229. The Commission, in those decisions, found no reason to give special deference to PASNY because it was a state agency, and the Second Circuit rejected the same claim Rhode Island again makes here. The fundamental facts here are that Congress had and has jurisdiction over the Niagara River, and that the states stand in the same shoes as any other party under the relevant provisions of the Niagara and Federal Power Acts. There is no illegal infringement on states' rights.

CONCLUSION

The Court should deny the petitions for certiorari filed by VDPS, NYCPUS and COWPUSA, and Rhode Island's cross-petition for certiorari.

Dated: July 10, 1991

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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

VERMONT DEPARTMENT OF PUBLIC
SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

[Caption Continued on Inside Cover]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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COUNTY OF WESTCHESTER PUBLIC UTILITY
SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE
OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

QUESTIONS PRESENTED

The Niagara Redevelopment Act (NRA), 16 U.S.C. 836-836a, gives "public bodies" a preference in receiving low-cost hydroelectric power from the Niagara Power Project. The questions presented are:

(1) Whether the criteria developed by the Federal Energy Regulatory Commission (the Commission) to identify "public bodies" under the NRA represent a permissible interpretation of the statute.

(2) Whether substantial evidence supported the Commission's conclusion that petitioners are not "public bodies" under the NRA.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1721

NEW YORK CITY PUBLIC UTILITY SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1725

VERMONT DEPARTMENT OF PUBLIC
SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1760

COUNTY OF WESTCHESTER PUBLIC UTILITY
SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1949

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE
OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 922 F.2d 73. The opinion of the Federal Energy Regulatory Commission (Pet. App. 64-109) is reported at 48 F.E.R.C. ¶ 61,124. The Commission's order denying rehearing (Pet. App. 110-114) is reported at 49 F.E.R.C. ¶ 61,069.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1990. A petition for rehearing was denied on February 12, 1991. The petitions for a writ of certiorari in Nos. 90-1721 and 90-1725 were filed on May 9, 1991. The petition for a writ of certiorari in No. 90-1760 was filed on May 13, 1991. The petition for a writ of certiorari in No. 90-1949 was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Niagara Redevelopment Act of 1957 (NRA) (also popularly known as the Niagara Power Project Act), 16 U.S.C. 836-836a, authorized the Federal Power Commission (FPC) to grant a license to the Power Authority of the State of New York (PASNY) to construct and operate a hydroelectric power project on the Niagara River. The NRA directed the FPC in issuing the license to PASNY to impose certain conditions "in addition to those deemed necessary and required under * * * the Federal Power Act [16 U.S.C. 791a et seq.]." 16 U.S.C. 836(b). The conditions prescribed in the NRA required PASNY "in disposing of 50 per centum of the project power [to] give preference and priority to public bodies and non-profit cooperatives within economic transmission dis-

tance." 16 U.S.C. 836(b)(1). PASNY was also required to make a "reasonable portion" (not to exceed 20%) of that 50%—*i.e.*, up to 10% of power from the Niagara Project—available for use in neighboring States. 16 U.S.C. 836(b)(2).

The FPC issued a license to PASNY for the Niagara Project in 1958, including in the license *verbatim* the conditions prescribed in the NRA. *Power Authority of New York*, 18 F.P.C. 344 (1957); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 106 (1960). Beginning in 1978, various customers of preference power from the Niagara Project filed a series of complaints against PASNY with the FPC's successor, the Federal Energy Regulatory Commission (the Commission). The complaints concerned PASNY's allocation of Niagara Project power among preference and non-preference customers.

In 1978, a complaint against PASNY was filed by the Municipal Electric Utilities Association (MEUA), the representative of the municipal utilities in New York that received preference power. The Commission held that PASNY had violated the NRA and its license by making long-term contracts with private utilities for Niagara Project power without adequately considering the projected needs of preference customers. See *Power Authority of New York* v. *FERC*, 743 F.2d 93, 97 (2d Cir. 1984) [hereinafter *PASNY*].

The Second Circuit affirmed the Commission's holding. In rejecting challenges to the Commission's decision, the court discussed "the nature of the preference created by the [NRA]." *PASNY*, 743 F.2d at 103. The court determined that the purpose of the preference was to promote "yardstick competition" between publicly owned utilities and privately owned utilities. *Id.* at 98-100, 104-105. The principle of "yardstick competition" was premised on a "basic determination" by Congress that "if [public bodies] * * * are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all." *Id.* at 105.

In 1980, another complaint against PASNY was filed by the associations representing preference customers in Connecticut and Massachusetts: the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC). In the ensuing proceeding, the Commission held that PASNY had improperly sold preference power to two entities—New York's Metropolitan Transit Authority (MTA) and the Vermont Department of Public Service (VDPS)—that were not "public bodies" within the meaning of the NRA. The Commission based its holding on its determination that neither MTA, which used all of the preference power itself, nor VDPS, which resold the preference power to private utilities, provided "yardstick competition" with private utilities. The Commission concluded that, in light of Congress's purpose to promote such competition, Congress intended the term "public bodies" to mean "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail."[1]

The Second Circuit upheld the Commission's definition of "public bodies" under the NRA. *Metropolitan Transp. Auth.* v. *FERC*, 796 F.2d 584 (1986), cert.

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[1] *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 F.E.R.C. ¶ 61,323, at 61,651 (1985); see also *Opinion 229-A; Opinion & Order on Rehearing*, 32 F.E.R.C. ¶ 61,194 (1985).

denied, 479 U.S. 1085 (1987) [hereinafter *MTA*]. The court stated that, although the Commission's definition of "public bodies" was not compelled by the text of the statute, "the legislative history of the NRA demonstrates that [the Commission's definition] is what Congress intended the term to mean." *Id.* at 591. The court reiterated that "Congress' crystal clear intent" was to foster "yardstick competition" between public bodies and private utilities. *Id.* at 593. It agreed with the Commission that Congress believed such competition would occur only if the public entities that received preference power "distributed that power to consumers." *Id.* at 592. The court concluded that "it was implicit throughout the debates that 'public bodies' were publicly-owned entities capable of distributing the preference power they received." *Ibid.*

2. This case began in February 1986, when MEUA filed a complaint with the Commission charging that PASNY was again allocating preference power from the Niagara Project to entities that were not "public bodies" within the meaning of the NRA. MEUA's complaint concerned PASNY's allocations to municipal distribution agencies (MDAs) in New York. The MDAs had arranged to distribute preference power to retail customers by leasing the facilities of private utilities. Additional complaints were filed by MMWEC and CMEEC concerning PASNY's allocation of preference power to VDPS. After a change in state law prompted by the *MTA* proceeding, VDPS had entered into lease agreements with private utilities similar to those entered into by the MDAs. See Vt. Stat. Ann. tit. 30, § 212a (1986). In a consolidated proceeding, the ALJ determined that neither VDPS nor the MDAs were entitled to preference power because they are

not "public bodies" under the NRA. Pet. App. 26-27, 54-63. The Commission adopted the ALJ's decision. *Id.* at 89-101.

a. In accordance with the Commission's pre-hearing order, the ALJ formulated three criteria for identifying "public bodies" under the NRA.[2] He then found that neither VDPS nor the MDAs satisfied any of these criteria.

First, the ALJ stated, "[a]n NRA public body must provide yardstick competition." Pet. App. 40. This requirement, he noted, had been identified in *MTA* as Congress's purpose for creating the "public bodies" preference. *Ibid.* (quoting *MTA*, 796 F.2d at 593). To provide yardstick competition, the ALJ determined, a public body must pose "a threat of takeover or displacement to the investor owned utilities." *Id.* at 40-41. It must also provide "a meaningful opportunity for consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities." Pet. App. 41. Finally, it must "substantially meet the energy needs of its customers." *Ibid.*

In addition to providing yardstick competition, the ALJ determined, "[a]n NRA public body must be directly responsible to retail consumers for the electric energy sold and delivered to them." Pet. App. 41. This second requirement, the ALJ observed, had previously been adopted by the Commission and upheld by the Second Circuit in *MTA*. The Commission had held that VDPS could not qualify as a public body merely by reselling preference power to private utilities because, "[a]lthough VDPS did arrange for distribution services [through resale], [it was not] the party *directly responsible* for the needs of the consumers served." *Ibid.* (quoting *Opinion 229-A*, 32 F.E.R.C. at 61,444 (emphasis supplied by ALJ)).

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[2] The Commission's order posed three issues for determination:

> (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
>
> (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?
>
> (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

Pet. App. 27-28.

Finally, the ALJ found, "[a]n NRA public body must have control over the distribution system." Pet. App. 42. The ALJ derived this requirement from the Commission's prior conclusion that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA." *Id.* at 43 (quoting *Opinion 229*, 30 F.E.R.C. at 61,651). The ALJ determined that "[t]o be capable of 'distributing power directly' means to have control of the distribution system so as not to have to rely on, or be constrained by anyone else, and to have a direct seller-customer relationship with each customer." *Ibid.*

Applying these criteria to the MDAs, the ALJ found that MDAs are not public bodies because, under their lease arrangements with private utilities, the private utilities retain control over distributing preference power to retail customers. Pet. App. 54-57. Under the leases, the private utilities reserved exclusive control over the leased facilities and remained exclusively responsible for supplying the needs of retail customers and ensuring continuity of service. *Id.* at 54. The private utilities also reserved the right to suspend or terminate the leases under a variety of circumstances that prevented the MDAs from exercising "independence of action" in improving rates and quality of service. *Id.* at 55. Moreover, the bills sent to retail customers did not allow any comparison between the private utilities' service and that available from the MDAs. *Id.* at 55-56.

Based on "virtually identical" (Pet. App. 58) leases between VDPS and private utilities in Vermont, the ALJ also concluded that VDPS is not a "public bod[y]." *Id.* at 57-61. The ALJ found that VDPS satisfied only one of the elements of providing yardstick competition; it "suppl[ied] a substantial percentage of Vermont's residents' needs for electricity." *Id.* at 60. VDPS did not, however, furnish retail customers with a basis for comparing the cost or quality of service. *Ibid.* Nor did VDPS have direct responsibility to retail customers for the service provided. Instead, the private utilities reserved exclusive control over distribution and retained full responsibility for providing service. *Id.* at 60-61. The terms of VDPS's leases "le[ft] no room for control by VDPS." *Id.* at 61.

b. The Commission adopted the ALJ's decision. Pet. App. 64-109. The Commission held that the three elements of yardstick competition articulated by the ALJ were "appropriate": "If these elements are absent the customer does not have a real choice among competitors." *Id.* at 88. The Commission also upheld the other two criteria for "public bodies" identified by the ALJ. *Id.* at 79-83, 86-89.[3] Finally, the

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[3] The Commission agreed with the ALJ that public entities do not have to own the system for distributing preference power to satisfy the second criterion—direct responsibility to consumers for distribution of power; instead, the requisite control can be achieved through proper leasing arrangements. Pet. App. 88. The Commission similarly sustained the ALJ's

Commission sustained the ALJ's conclusion that neither VDPS nor the MDAs are "public bodies" under the NRA. *Id.* at 89-101.

3. The court of appeals affirmed. Pet. App. 1-24. The court initially determined that the Commission's interpretation of the NRA and of PASNY's license should be reviewed under the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that the Commission's factual findings should be upheld if supported by substantial evidence. Pet. App. 12-13.

The court upheld the Commission's criteria for identifying "public bodies" for purposes of the NRA. Pet. App. 13-17. The court observed that "the term 'public body' is not defined in the NRA." *Id.* at 14. The court determined that, in giving content to that term, the Commission properly elaborated upon its prior conclusion that "in order to qualify as a 'public body' an entity must actually deliver its energy to retail customers." *Id.* at 15. The Commission's interpretation, the court held, appropriately "strikes a delicate balance":

> While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Id. at 17.

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conclusion that the third criterion can be satisfied if a public body meets "substantially" all of its retail customers' needs, thereby affording public entities a measure of "flexibility." *Id.* at 88-89.

The court further held that substantial evidence supported the Commission's conclusion that neither VDPS nor the MDAs are "public bodies." Pet. App. 17-23. The court observed that the findings on which that conclusion was based "encompass all of the specific points" that petitioners contended had not been considered. *Id.* at 18. In making those findings, the court held, the Commission properly relied on the terms of petitioners' lease agreements with the private utilities that distributed the preference power. *Id.* at 19. The court agreed with the Commission that, under the leases entered into by the MDAs, "all responsibility for [distribution] operations rested with the IOU [*i.e.*, investor-owned utility]." *Ibid.* The court similarly determined that under its leases VDPS "ha[d] no responsibility for the maintenance, construction, or operation of the distribution facilities" (*id.* at 20-21) and was "essentially * * * precluded from competing with the IOUs on a cost basis" (*id.* at 21). "If spurring competition is the objective of the NRA," the court concluded, "it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective." *Ibid.*

ARGUMENT

The court of appeals properly applied *Chevron*, *supra*, to review the Commission's criteria for identifying "public bodies" under the NRA and correctly concluded that those criteria represent a permissible interpretation of a statute of limited geographic scope. The court was also correct in affirming the Commission's conclusion that petitioners are not "public bodies" for purposes of the NRA. Further review is therefore not warranted.

1. Petitioners contend that the court of appeals improperly relied on *Chevron, supra,* in reviewing the

Commission's interpretation of the NRA. They argue that (1) the Commission's interpretation does not reflect the exercise of independent judgment; (2) PASNY's interpretation rather than the Commission's is entitled to deference from a reviewing court; and (3) the Commission's interpretation violates the plain language and intent of the NRA. These arguments do not withstand analysis.

a. Petitioners VDPS and New York City Public Utility Service (NYCPUS) contend (VDPS Pet. 12-15; NYCPUS Pet. 12-14) that the Commission "never exercised its discretion" (VDPS Pet. 12) in this case. Instead, they assert, the Commission considered its decision to be "mandated" by the court of appeals' decision in *MTA*. VDPS Pet. 12-13; NYCPUS Pet. 12-13. That assertion is incorrect.

As the court of appeals stated, the proceedings in this case reflected the Commission's "attempt to clarify further the requisite characteristics of a 'public body.'" Pet. App. 15. At the outset of the proceeding, the Commission issued an order directing the ALJ to "develop criteria for determining when an entity that does not own a distribution system may qualify as a public body." *Id.* at 83 n.36; see note 2, *supra*. Pursuant to the order, the ALJ received extensive evidence and briefing aimed at formulating a set of criteria based on statutory sources and on Commission and court precedent. See Pet. App. 28-44. The criteria ultimately adopted by the ALJ "expand[ed] on concepts * * * initially articulated in *PASNY* and *MTA*." *Id.* at 16.

The Commission correctly viewed the ALJ's criteria as the product of discretionary decision making, and it adopted them because they accorded with the purpose of the NRA and with precedent. The Commission upheld the criterion requiring that a public body control the distribution system as "a logical interpretation of the precedent." Pet. App. 83 n.36. It held that the requirements for yardstick competition were an "appropriate" way of furthering the purpose of the NRA. *Id.* at 88. Similarly, it upheld the requirement that a public body meet substantially all of its customers' needs as permitting needed "flexibility." *Ibid.*

b. The court of appeals correctly held that the Commission's criteria for identifying "public bodies" deserve "great deference." Pet. App. 12. Congress entrusted the Commission with the responsibility to ensure that PASNY complies with the license for the Niagara Project. The Commission's authority derives from both the NRA and the Federal Power Act. 16 U.S.C. 836(a); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960) (Federal Power Commission had authority under the FPA, 16 U.S.C. 814, to condemn property for Niagara Project). The Commission developed its criteria in the course of determining whether PASNY had complied with its license. The criteria thus represent "an executive department's construction of a statutory scheme it is entrusted to administer," and as such are entitled to "considerable weight." *Chevron*, 467 U.S. at 844.

In contending that PASNY's interpretation of the NRA, not the Commission's, is entitled to deference, petitioner VDPS relies (VDPS Pet. 10, 16) on this Court's decision in *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171 (1991). As petitioner concedes (Pet. 16), however, there are "obvious[]" differences between this case and *Martin. Martin* concerned the "unusual regulatory structure" (111 S. Ct. at 1176) of split federal enforcement created in the Occupational Safety and Health Act of

1970. In contrast, under the NRA and the FPA, the Commission is the only agency responsible for enforcing PASNY's compliance with the license for the Niagara Project. Pet. App. 12-13; see *Opinion 229-A*, 32 F.E.R.C. at 61,451 n.12; see also *PASNY*, 743 F.2d at 108 (labelling "doubtful" PASNY's argument that it was entitled to more deference than other licensees of the Commission). For present purposes, PASNY's role is more that of regulatee rather than regulator, and it is the Commission in which Congress has reposed responsibility to enforce the legislative will. Furthermore, because the Commission's responsibilities under the FPA extend to federal power projects across the nation, it clearly has greater expertise than PASNY to decide issues concerning the allocation of power. For all these reasons, the logical conclusion is that Congress intended to invest the Commission, not PASNY, with discretion in interpreting the NRA. Cf. *Martin*, 111 S. Ct. at 1176-1177.

c. Likewise without merit is petitioners' contention that the Commission's "public bodies" criteria violate the plain language and intent of the NRA. At the outset, petitioners are mistaken in relying on "plain language" arguments. See VDPS Pet. 17-22; COWPUSA Pet. 12-24. As the court of appeals observed, "the term 'public body' is not defined in the NRA." Pet. App. 14. The court properly reviewed the Commission's criteria to determine whether they are "based on a permissible construction of the [NRA]." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

In upholding the Commission's criteria as "consistent with the history and purposes of the NRA" (Pet. App. 24), the court of appeals was guided by its prior decisions in *PASNY* and *MTA*. *Id.* at 6-8, 14-17. The court in those cases had held that Congress's "crystal clear intent" in the NRA was to promote "yardstick competition" between publicly owned and privately owned utilities. *MTA*, 796 F.2d at 593; see also *PASNY*, 743 F.2d at 104-107. The court here determined that the Commission's criteria were resonable means of promoting "yardstick competition":

> The Commission's "public body" test strikes a delicate balance. While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Pet. App. 17.

Petitioners NYCPUS and VDPS concede that the purpose of the "public bodies" preference is to provide "yardstick competition"; they contend, however, that the Commission's criteria go beyond what Congress considered necessary to ensure such competition. NYCPUS Pet. 11-12; VDPS Pet. 20-21.[4] Specifically, they assert that (1) Congress intended public bodies to compete only in the supply, not in the distribution, of preference power; and (2) Congress intended only regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities. NYCPUS Pet. 11; VDPS Pet. 20. Based on these assertions, petitioners argue that the Commission's criteria violate Congress's intent by requiring that public bodies control the system for distributing preference power and that consumers be able to compare the cost and quality of service.

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[4] Petitioner COWPUSA takes a different tack, arguing that "'yardstick competition' is a nonsensical economic doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA" (COWPUSA Pet. 10-11), and that the principle of "yardstick competition" violates the Tenth Amendment because it infringes on the authority of States to apply state law in allocating preference power from the Niagara Project (*id.* at 29-34). In *PASNY* and *MTA*, the Second Circuit considered all of the arguments that COWPUSA raises here and correctly rejected them. See *PASNY*, 743 F.2d at 106 (NRA preempts conflicting state law regarding allocation of preference power from Niagara Project); see also *id.* at 104-106 (discussing "yardstick competition"); *MTA*, 796 F.2d at 591-593 (same). And in *MTA* this Court denied certiorari. 479 U.S. 1085 (1987).

The chief difficulty with petitioners' argument is that nothing in the text or history of the NRA supports petitioners' particularized view of congressional intent. Petitioners base their argument exclusively on one sentence in the *MTA* opinion:

> The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

796 F.2d at 592, quoted at NYCPUS Pet. 11 and VDPS Pet. 20. Petitioners obviously err in treating the court's statement as if it were statutory text. Moreover, petitioners misread the court's statement. Indeed, the court in *MTA* rejected the argument renewed here that control over distribution was irrelevant to a public entity's status as a "public bod[y]." *MTA*, 796 F.2d at 593 ("public bodies" must be "capable of selling *and distributing* power directly to consumers of electricity at retail") (emphasis added).[5] Moreover, the court in *MTA* never sug-

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[5] See also *MTA*, 796 F.2d at 592 ("[I]t was implicit throughout the debates that 'public bodies' were publicly-owned en-

gested that Congress intended only regulators, not consumers, to be able to compare the service provided by private utilities to that provided by "public bodies." It is therefore not surprising that the court in this case saw no inconsistency between the Commission's criteria and the court's prior decision in *MTA*.

At bottom, petitioners' challenge to the Commission's criteria is based on their view that the Commission could have developed a less restrictive definition of "public bodies." [6] Even if that is so, it provides no basis for setting aside the Commission's decision. A reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction." *Chevron*, 467 U.S. at 843 n.11. The Commission's criteria for identifying "public bodies" are fully consistent with the language and intent of the NRA and were therefore properly upheld by the court of appeals.[7]

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tities capable of distributing the preference power they received.").

[6] Petitioners NYCPUS and VDPS cite *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983), in arguing that competition in a regulated industry can be achieved without requiring "yardstick competition." NYCPUS Pet. 9-10; VDPS Pet. 27-28. These decisions are inapposite, and petitioners' arguments beside the point, in light of Congress's purpose in the NRA to encourage yardstick competition, not simply competition of any sort. The Commission properly rejected such arguments, observing that the Second Circuit had previously refused to "second-guess [Congress's] basic determination." Pet. App. 84-85 (quoting *PASNY*, 743 F.2d at 105).

[7] Cross-petitioner contends (Cross-Pet. 4-14) that States should be entitled to receive preference power without regard

2. Petitioners NYCPUS and VDPS contend that the Commission erred in concluding that neither VDPS nor MDAs qualified as "public bodies." VDPS Pet. 16-28; NYCPUS Pet. 10-14 & nn.11-14. The court of appeals properly rejected that contention, observing that petitioners' arguments on this score "are nothing more than veiled attempts at collaterally attacking the 'public body' criteria." Pet. App. 18. As such, petitioners' arguments have been answered above.

The ALJ and the Commission found that neither VDPS nor the MDAs satisfied any of the three criteria for "public bodies." Pet. App. 44-61, 89-101. That finding was based on express restrictions in the lease agreements with private utilities into which VDPS and MDAs had entered. *Id.* at 54-56, 60-61, 94-95, 100-101. Under those agreements, the private utilities retained exclusive control of the distribution system and remained exclusively responsible for meeting the needs of retail customers. *Ibid.* Moreover, the agreements did not permit retail customers to compare the service provided by the private utilities to service provided by the public entities. *Id.* at 55-56, 60, 95, 101. There was thus ample evidence to support the conclusion that neither VDPS nor the MDAs qualified as "public bodies."

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to whether in using it they provide "yardstick competition." The court of appeals correctly rejected that argument. Pet. App. 21-22. This is not a situation in which congressional attention was focused on the activities of private persons; to the contrary, the statutory text at issue applies to "public bodies." The legislative history of the NRA convincingly shows that Congress intended "public bodies" to provide "yardstick competition." Nothing in the text of the NRA or in the legislative history suggests that Congress intended to except States from this requirement.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

In The

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

[Caption Continued on Inside Cover]

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY OF VERMONT DEPARTMENT OF PUBLIC SERVICE TO BRIEFS OPPOSING ITS PETITION FOR A WRIT OF CERTIORARI

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14

COUNTY OF WESTCHESTER PUBLIC UTILITY
SERVICE AGENCY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE
OF RHODE ISLAND, Et Al.,
Petitioners,
v.
NEW YORK CITY PUBLIC UTILITY SERVICE, Et Al.,
Respondents.

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ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE AN AGENCY ADOPTS A STANDARD BASED ON THE MISTAKEN ASSUMPTION THAT THE STANDARD IS MANDATED BY STATUTE, CASE LAW OR LEGISLATIVE HISTORY

Respondents in this case, the Federal Energy Regulatory Commission (FERC) and several parties who intervened in support of FERC in the case below,[1] have filed briefs in opposition to the petition for writ of certiorari filed by the Vermont Department of Public Service (VDPS or Vermont). However, neither FERC nor those supporting it questioned this basic proposition of law presented in Vermont's petition: If an agency wrongly believes that its application of an ambiguous statute is mandated by law it has not exercised its own discretion and is not entitled to deference from a reviewing court under *Chevron*.[2]

VDPS demonstrated in its petition that FERC erroneously believed the control criterion incorporated into its definition of "public body" was mandated by the Niagara Redevelopment Act (NRA). FERC's response does not refute this point, but indicates that FERC *still* believes its control criterion was mandated by the Act. According to FERC, the control requirement is a "logical interpretation of the precedent." FERC Br. pp. 11-12. The Second Circuit, however, already has said that neither the statute itself nor prior case law mandates any of the several public body criteria adopted by FERC (14a). Where an agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification on the agency's behalf. *Dept. of Treasury v. FLRA*, 110 S. Ct. 1623, 1629-30 (1990). *See also Phillips Petroleum Co. v. FERC*, 792 F.2d. 1165, 1169 (D.C. Cir. 1986). Thus, even if an independent rationale for the control criterion could be devised and defended by FERC in the exercise of its discretion, it has not exercised that discretion here and, contrary to the Second Circuit's holding, is not entitled to deference under *Chevron*. *Id.*

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[1] The Connecticut Municipal Electric Energy Cooperative and the Massachusetts Municipal Wholesale Electric Company, the Allegheny Electric Cooperative, Inc., City of Cleveland, the Municipal Electric Utilities Association of New York State, and the Public Power Association of New Jersey.

[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*").

The brief of intervenors in support of FERC similarly reinforces rather than defuses Vermont's argument. Intervenors do not dispute that FERC believed itself bound to adopt the control criterion. Instead, they advance the curious argument that the source of FERC's belief was the legislative history of the NRA, rather than prior case law:

> The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a 'public body' control a distribution system; instead, the Commission stated that 'the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution.' Opinion No. 329, P.A. at 86 (emphasis added). *The FERC's reliance then was not on MTA but on the legislative history discussed in MTA.*[3]

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[3] *"MTA"* refers to *Metropolitan Transportation Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Electric Cooperative, Inc. v. FERC*, 479 U.S. 1085 (1987).

Int. Br. at 12-13 (emphasis added.)

This is a distinction without a difference. Whether FERC misread prior case law or legislative history, its decision is not entitled to deference if it erroneously "believe[d] the standard to be dictated by the statute itself" rather than "adopted as a matter of policy in order to effectuate the purposes of the Act." *International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987). See also *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, concurring in relevant part.) The *source* of FERC's error, i.e., the text of the statute, the legislative history or prior case law, is plainly irrelevant.[4] "When the [agency] bases a decision on a standard that it unjustifiably believes was mandated by Congress, the [agency's] decision must not be enforced, even though the [agency] might be able to adopt the very same standard in the exercise of its discretion." *International Brotherhood*, 814 F.2d at 708. Here, FERC's mistaken assumption that a public body is required to have physical control of a distribution system was an error which clearly "infected its promulgation" of a public body definition, *Planned Parenthood*, 712 F.2d at 667,[5] and the Second Circuit incorrectly applied *Chevron* when it deferred to that definition.

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[4] See, e.g., *Prill v. NLRB*, 755 F.2d 941, 952 n.66 (D.C. Cir.) *cert. denied* 474 U.S. 948 (1985) (NLRB found to be "mistaken in its view that the language, history *and* prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the [NLRA] Act." (emphasis added)).

[5] Intervenors supporting FERC appear to argue that the agency's decision is sustainable on the basis of its "separate" direct responsibility criterion. Int. Br. pp. 13-14. However, as Vermont

II. DEFERENCE, IF ANY, WAS DUE PASNY, NOT FERC.

If the Second Circuit owed any deference in this case, it was to the Power Authority of the State of New York (PASNY), not FERC. Vermont Pet. pp. 15-16. FERC responds to this argument by asserting that, unlike *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991) (*Martin*), this case involves no "split enforcement" structure and that "it is the Commission in which Congress has reposed responsibility to enforce the legislative will." FERC Br. p. 13.

Intervenors supporting FERC unwittingly, but directly, refute this assertion with a passage from one of FERC's own orders. Maintaining that "prior precedents dispose of the VDPS argument" (Int. Br. at 20), Intervenors cite FERC's statement in Opinion No. 151 that "*Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission.*" *Id.* (quoting *MEUA v. PASNY* (Opinion No. 151), 21 FERC ¶ 61,021, at 61,126 (1982) (emphasis added).[6]

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noted in its petition, the Commission treated these criteria interchangeably, affirming its Administrative Law Judge's decision that "to be directly responsible, a public body * * * must control the distribution system." (73a). In any event, under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), a reviewing court may not assume that, unencumbered by its erroneous view that the control criterion was required, FERC would have adopted the same definition of public body. *See also, Dept. of Treasury v. FLRA*, 110 S. Ct. at 1629-30.

[6] Citing this Court's per curiam decision in *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945), Intervenors also assert that since the *Martin* issue was not raised before the Second Circuit it cannot form the basis for granting a writ of certiorari. Int. Br. p. 19. This Court, however, has no such

This separation of functions brings the instant case squarely within the framework of *Martin*, which, in turn, overrides any prior FERC assertions that PASNY is not entitled to deference. The Occupational Safety and Review Commission's (OSHRC) role, as described in *Martin*, was not policy-fashioning, but adjudicatory. Because the Secretary of Labor, not OSHRC, had day-to-day responsibilities for administering the statute, the Court held that Congress intended to invest interpretative power in the Secretary. *Martin*, 111 S. Ct. at 1177. Similarly, it is PASNY, not FERC, which bears responsibility for allocating preference power, setting rates for that power and assuring its transmission. FERC's self-described role in the process is purely adjudicatory:

> We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

Opinion No. 229-A, 32 FERC ¶ 61,194, at 61,451 n.12 (1985).[7] In these circumstances the Second Circuit should not have deferred to FERC.

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ironclad standard. See *Vance v. Terrazas*, 444 U.S. 252, 258, n.5 (1980); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc.*, 340 U.S. 211, 214 (1951). More important is that the error cited in Vermont's petition was the Second Circuit's decision to defer to FERC. That error did not occur *until* the Second Circuit rendered its opinion. Finally, the *Martin* decision was not issued by this Court until *after* the Second Circuit's decision. The applicability of an intervening decision of this type is an appropriate subject of a petition for writ of certiorari. *Vandenbank v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941).

[7] FERC's further assertion that it should be given deference

III. THE SECOND CIRCUIT ERRED IN DEFERRING TO AN AGENCY STANDARD WHICH DENIES PUBLIC BODY STATUS TO PUBLIC ENTITIES WHICH SATISFY THAT COURT'S OWN STATED UNDERSTANDING OF THE STATUTE'S INTENT

FERC correctly observes that under the Second Circuit's 1986 decision in *MTA* the " 'crystal clear' intent of the statutory preference for public bodies is to promote yardstick competition." (FERC Br. p. 5, 14). Yardstick competition itself, it bears repeating, is not a term found in the statute. If, however, promotion of yardstick competition is the purpose of the NRA, then public entities which provide yardstick competition must be public bodies. Conversely, any definition of public bodies that denies public body status to such yardstick competitors is inherently arbitrary and cannot be entitled to deference from a reviewing court. The Second Circuit held in *MTA* that public entities whose retail rates can be compared by regulators to those charged by private utilities provide

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because its "responsibilities under the FPA extend to federal power projects across the nation", thereby giving it "greater expertise than PASNY to decide issues concerning the allocation of power" (FERC Br. p. 13), is simply untrue. While FERC has a very limited, "appellate body" role in *rate*-setting for federal power marketing agencies, *United States v. City of Fulton*, 475 U.S. 657, 663 (1986); *CP National Corp. v. Bonneville Power Administration*, 928 F.2d 905, 911 (9th Cir. 1991), most agencies charged with marketing federal preference power *allocate* that power without *any* FERC role, even an adjudicatory one. (The various federal preference power statutes are identified in Vermont's petition, p. 11 n.9). Where reviewing courts have found an ambiguity in the statutory allocation scheme, they have given those agencies deference. See, *e.g.*, *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). PASNY, not FERC, is the counterpart of those agencies.

yardstick competition. As VDPS has pointed out, there was no dispute from the Commission that VDPS provided the requisite regulatory yardstick. *Id.*[8] VDPS argued, therefore, that the Second Circuit's error was in deferring to a FERC definition of yardstick competition which expressly held that only public entities which facilitated consumer comparisons, not regulatory comparisons, would qualify as public bodies. Vermont Pet., p.20. When FERC adopted a standard holding that only *some* yardstick competition qualifies, it strayed so far from the statutory text as to remove any basis for a court to defer to its interpretation. *Id.*

FERC simply has no answer to this argument. Instead, it answers an argument VDPS never made. According to FERC, VDPS has contended that "Congress intended *only* regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities." FERC Br. p. 15 (emphasis added).[9] VDPS has never contended that a public entity whose rates and services can be compared by consumers to those of private utilities is not a public body.[10] The Second Circuit's error was in affirming a public body definition which excluded public entities capable of providing a regulatory yardstick, *i.e*, yardstick competition as that court *itself* had defined the term.

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[8] Vermont petition, p. 20 (citing *MTA*, 796 F.2d at 592). Oddly, FERC accuses Vermont of error "in treating the court's statement [in *MTA*] as if it were statutory text." FERC Br. p. 15. It is FERC which has adopted a public body definition wholly divorced from the text of the statute. Indeed, in the same paragraph of its brief where FERC criticizes Vermont for reliance on the Second Circuit's *MTA* decision, FERC cites the decision for the proposition that the NRA *requires* a public entity to control a distribution system in order to qualify as a public body—the very proposition which the Second Circuit *did* reject in the case now before this Court (14a).

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[9] FERC misstates another argument made by Vermont in attempting to bolster its claim to deference. According to FERC, VDPS has ignored the requirement of *MTA* that a public body be "capable of selling *and distributing* power directly to consumers at retail," FERC Br. p. 15 (quoting *MTA* 796 F.2d at 593 (emphasis in original)), and instead has argued that "competition in a regulated industry can be achieved without requiring 'yardstick competition'." FERC Br. p. 16 n.6. Vermont has argued nothing of the sort. In *MTA* the Second Circuit held that "*[y]ardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers.*" 796 F.2d at 592 (emphasis added). What Vermont has pointed out is that, as in the telecommunications and natural gas industries, access to, not control of a distribution system is all that is necessary to compete in selling and distributing power to ultimate consumers (Pet. pp. 27-28), and that FERC had never given a reasoned explanation why more was demanded of a public body. *Id.* The lower court itself seems erroneously to have assumed that only "active management control over the distribution of preference power" was being required (17a) rather than the complete *operational* control of the distribution facilities actually required in Opinion No. 329 (73a, 80a-83a, 88a). Management control over the distribution of preference power, of course, is achieved if the public body has *access* to the facilities used to distribute its power (36a).

[10] On the contrary, we argued to the lower court—and reiterated in our petition here—that FERC erred in failing to consider a Vermont statute which mandates a comparison on consumer bills between the rates of VDPS and private utilities (Vermont pet. p. 7, n. 7; 20a, n.1).

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July 31, 1991

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STATE OF RHODE ISLAND AND THE RHODE ISLAND
PUBLIC UTILITIES COMMISSION,
Cross Petitioners,
v.
NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT
DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF
WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc., the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative, the Massachusetts Municipal Wholesale Electric Company, the Municipal Electric Utilities Association of New York State and the Public Power Association of New Jersey (collectively referred to herein as "Public Systems"), file this supplemental brief in opposition to the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949 in order to bring to the attention of the Court new matter that was not available at the time Public Systems filed their primary brief in opposition. Sup. Ct. Rule 15.7.

Petitioners Vermont Department of Public Service (Petition at 12, 19) and New York City Public Utility Service (Petition at 8) rely on the dissent in *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991), in partial support of their petitions.

In *Salt Lake*, all deadlines for parties to seek further review after the denial of rehearing expired on July 17, 1991. No petition for a writ of certiorari was filed and the *Salt Lake* decision is now final in all respects.

There was never any basis for certiorari in reliance on a dissent. There certainly is none now given the finality of the *Salt Lake* majority decision.

The Court should deny the pending petitions for writs of certiorari.

Dated: August 9, 1991

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